United States Court of Appeals

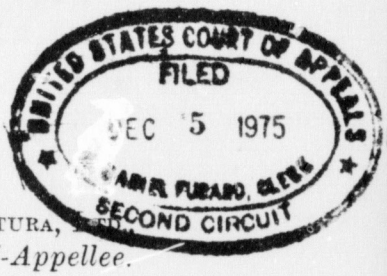
for the Second Circuit

APPELLANT'S BRIEF

No. 75-7332

United States Court of Appeals

FOR THE SECOND CIRCUIT



Docket No. 75-7332

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, [illegible] IN BANKRUPTCY PROCEEDINGS, *Plaintiff-Appellee.*

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, and BURLINGTON INDUSTRIES, INC., *Defendants-Appellants,*

BRIEF OF APPELLANT BURLINGTON INDUSTRIES, INC.

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BRIEF OF APPELLANT BURLINGTON INDUSTRIES, INC.

Preliminary Statement

This is an action tried by a jury under Section 1 of the Sherman Act for treble damages charging appellants (and another defendant exonerated by the jury) with an alleged conspiracy to drive a former customer, Textura, Ltd., out of business.[1]

The district court (Judge Tenney) reserved decision on defendants' joint motion for a directed verdict at the conclusion of plaintiffs' case. After a still-unexplained disappearance from court during the testimony of defendants' only witness (Mr. Garvey, head of the Credit Department of Burlington Industries, Inc. ("Burlington")), the trial judge returned to court three days later and submitted the case to the jury on various theories of implied, circumstantial conspiracy.

The judge again disappeared from court, never to return

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[1] Textura, Ltd., appearing here through its trustees in bankruptcy, was the successor to a company known as "Glass Fabrics, Inc." Except where required by the context, these companies are referred to herein as "Textura" or "plaintiff."

prior to the jury's verdict.[2] During its five days of deliberations, the jury made numerous requests for guidance and clarification of the charge—particularly as it related to the law of implied conspiracy and the meaning of circumstantial evidence.

Defendants' joint motion for a mistrial, made on the fourth day of these deliberations and with the trial judge still absent, was denied by Chief Judge Edelstein (App. 1266-67). The Chief Judge, after giving a new charge on the law of conspiracy and purporting to answer other of the jury's questions, presided when the jury on the fifth day of its deliberations returned a verdict finding that two of the defendants, Burlington and Clark-Schwebel Fiber Glass Corporation (but not defendant J. P. Stevens & Company, Inc.) had conspired to drive Textura out of business primarily by restricting its credit and failing to deliver usable merchandise. Single damages were assessed in the amount of $531,617, which was trebled by judgment entered on November 22, 1974.

Defendants' renewed motion for directed verdicts and motions for judgment notwithstanding the verdict and/or a new trial were summarily denied by Judge Tenney without citation to a single case in an unreported "Memorandum Order" dated May 2, 1975.*

ISSUES PRESENTED

The jury found that Burlington and Clark-Schwebel conspired to drive Textura out of business by such means as restricting Textura's credit and failing to deliver fabrics. It is undisputed that the finding of conspiracy rests not upon any direct evidence but upon inferences drawn from

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[2] This seemingly bizarre conduct may be fully justifiable on the basis of the "personal" reasons referred to by the court in its memorandum (App. 277), but these reasons have never been particularized. A discussion of the obvious prejudice to the defendants resulting from the absence of the trial judge to provide guidance to a confused jury is set out in appellant Clark-Schwebel's brief, which, to avoid repetition, we adopt by reference.

* Relevant statutes are set out in Appendix A to the brief of defendant-appellant Clark-Schwebel.

the business conduct of defendants during the period of the alleged agreement.

As to Burlington's participation in the alleged conspiracy, the principal questions presented are whether the district court erred in finding that:

1) Burlington's acts and practices with respect to Textura were sufficiently similar and parallel to those of defendant Clark Schwebel to raise an inference of agreement and conspiracy to treat plaintiff uniformly;

2) Burlington's credit and sales treatment of plaintiff during the period of the alleged conspiracy, including requests that Textura's principal stockholder personally guarantee payment of plaintiffs' bills to Burlington, were contrary to this defendant's business self-interest and would not have been taken unless the other defendants had agreed to act similarly.

The district court also held, without reference at all to any facts, that further inferences of conspiracy properly could be drawn from evidence of "contact and communication" between defendants' credit personnel, "motive," "admissions," and "threats." Since there was no elaboration of these "other factors" in the court's memorandum, we can only assume that the trial judge was referring to the facts subsumed in the following additional questions (which are the only facts of record remotely relating to the quoted, conclusory references):

3) Whether further inferences of conspiracy to destroy Textura properly could be derived from:

a) Exchanges of credit information between Burlington and Clark-Schwebel;

b) A "motive" on Burlington's part to drive Textura out of business (based on complaints received since 1962 from other customers about Textura's selling methods);

c) An "admission" by a Burlington sales employee in 1964 (two years before the conspiracy allegedly began) that he would rather not do business with Textura if he did not have to; or

d) A "threat" by the head of Burlington's Credit Department in July, 1966 that a further open line of credit

probably would not be extended to Textura unless a $90,000 arbitration dispute with Clark-Schwebel could be resolved on a basis permitting Textura to pay its bills to Burlington.

Assuming, arguendo, the existence of an agreement to drive Textura out of business, the following further questions are presented.[3]

4) Whether, in view of such matters as Textura's admitted chronic shortage of funds and the nonconspiratorial termination of its factoring agreement without which it could not operate, plaintiff sustained its burden of showing by clear and convincing evidence that defendants' conduct caused the destruction of its business; and

5) Whether there was any reliable, probative evidence before the jury from which the amount of Textura's damages reasonably could be calculated.

STATEMENT OF THE CASE

This is a private treble damage antitrust suit filed in December 1966, at about the time plaintiff Textura made an assignment for the benefit of creditors. The original complaint named as plaintiffs Textura, Ltd., Fenestra Fabrics, Inc. (a wholly owned subsidiary of Textura), and Malcolm G. Powrie (president and principal stockholder of Textura) (App. 1). Until it ceased operations in December of 1966, Textura had been engaged in the business of manufacturing and installing decorative fiber glass fabrics as draperies and curtains in office buildings and apartments. Its principal suppliers of this product were the defendants in this suit: Clark-Schwebel Fiber Glass Corporation, Burlington Industries, Inc., and J. P. Stevens & Co., Inc. Numerous co-conspirators were named, including L. F. Dommerich, Inc., a factoring house which for a number of years had purchased from and advanced money to Textura upon cer-

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[3] Additional substantial questions are also raised relating to errors in the conduct of the trial requiring reversal and a new trial. These issues and the arguments relating thereto apply equally to both appellants. These matters are covered fully in the separate brief filed by appellant Clark-Schwebel, which we hereby adopt and join in.

tain of the latter's invoices to its customers. Other alleged co-conspirators were a group of third parties who for a brief period following Textura's bankruptcy, ran a small decorative fabrics business on the West Coast known as "Soft-Flex."

Numerous violations of the antitrust laws were alleged in the complaint, including Sections 1 and 2 of the Sherman Act and various provisions of Section 2 of the Clayton Act (the Robinson-Patman Act). The basic allegation in the case, as finally defined by lengthy discovery, was to the effect that defendants and co-conspirators agreed and conspired to drive Textura out of business by: 1) restricting or cutting back (in the case of Stevens and Burlington) and eliminating altogether (in the case of Clark-Schwebel) Textura's terms of credit, 2) holding up deliveries of fabrics, 3) deliberately shipping defective merchandise, and 4) inducing Textura's factor, Dommerich, to terminate the purchase of Textura's invoices, without which arrangement Mr. Powrie testified his company could not survive. There was also an allegation, and much of the pretrial discovery—as well as trial time—was devoted to it, that defendants fixed the price of the decorative fabrics sold by them to Textura and, since all the styles sold to Textura were different, that this price-fixing was accomplished by an agreement among defendants to sell fabrics at uniform prices based on the weights of the various decorative designs sold, *i.e.*, prices were fixed on a per-pound basis.

Trial on all issues commenced before Judge Tenney and a jury on October 15, 1974. Plaintiffs relied principally on the business acts and conduct of the defendants and co-conspirators as circumstantial evidence of a conspiracy to drive Textura out of business. During the course of the trial, the judge ruled that there had been no proof of participation in any of the alleged conspiratorial activities by the co-conspirators Dommerich and the Soft-Flex principals (App. 917-18, 980, 1233-36).

At the conclusion of plaintiffs' case, the court dismissed the decorative price fixing charge, and dropped Fenestra Fabrics as a party to the case for lack of standing (App. 999-1000, 1001). Plaintiffs voluntarily withdrew all charges

of monopolization under Section 2 of the Sherman Act and all charges of price and other discrimination under the Robinson-Patman Act (App. 990-91).

Decision on defendants' joint motion for directed verdicts on the "credit conspiracy" was reserved. These motions were based upon the lack of uniformity of conduct among defendants and upon the fact that each act relied upon was consistent with the self-interest of each defendant on an hypothesis of independent business behavior.

In view of the court's ruling apparently dropping the co-conspirator Dommerich from the case, defendants in the presentation of their case did not show that Dommerich had terminated plaintiff because, among other things, Textura had committed what amounted to a fraud on Dommerich by trying to obtain advances on undue invoices (*e.g.*, the so-called Del Webb job).[4] See extracts of deposition of William Hornickel, California Vice President of Dommerich (designated before trial but not read because of the court's ruling), attached hereto as Appendix A in the nature of an offer of proof. Defendants' case consisted of one witness, a small group of documents and various brief passages of deposition transcripts.

Following the disappearance and subsequent brief return of the trial judge (as discussed above), defendants renewed their motion for directed verdict. These again were taken under advisement and the case was submitted to the jury on November 12, 1974, on a charge which, in contradiction to the district court's trial rulings and perhaps resulting from the apparently serious "personal" reasons requiring the judge's sudden prior disappearance, sent issues to the jury concerning Dommerich's participation in the alleged conspiracy (as well as that of other co-conspirators who had been ruled out of the case during the course of the trial for lack of evidence of participation).

Seven days later, following five days of deliberation involving numerous requests for clarification of the law (App. 1252-53, 1257-62, 1273-1276, 1278), the jury returned

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[4] Indeed, in view of the court's ruling that Dommerich was out of the case, such evidence would have been irrelevant.

its verdict against defendants Clark-Schwebel and Burlington (but not against defendant Stevens) assessing single damages in the amount of $531,617.[5] The jury found that Mr. Powrie, suing as president, principal stockholder, etc., had not been personally injured as a result of any of the activities complained of.

Defendants promptly renewed their motion for directed verdicts and timely filed comprehensive motions for judgment notwithstanding the verdict and/or for a new trial under Rules 50(b) and 59 of the Federal Rules of Civil Procedure.

Without oral argument, the district court summarily denied these motions in a "Memorandum Order" dated May 2, 1975. Only three sentences were devoted to our contention that the evidence established that the defendants treated Textura differently, that each act relied upon to show conspiracy was consistent with the business self-interest of the actor and would have been taken in the absence of a conspiracy, that Burlington's credit and sales policies indisputably had been independently formulated *before* the allegedly conspiratorial credit checks, and that in these circumstances at least ten reported decisions hold that such a case, inviting speculation, surmise and the exercise of prejudice, should not be sent to the jury. Not one of these cases was cited, with the court merely stating (also without reference to the record) that all of the acts of Burlingon and Clark-Schwebel, while admittedly not "identical and contemporaneous," were "*similar* or *parallel* . . . [,] were taken in apparent contradiction to defendants' self-interest and

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[5] Defendants did not contest the charge that prices had been inflated on the minimal amount of *industrial* fabrics purchased by Textura from Burlington and Stevens (but not from Clark-Schwebel) and damages on this uncontested claim were assessed against Stevens and Burlington in the amounts of $22.50 and $77.16 respectively. This aspect of the case is involved on this appeal only because of the prejudice resulting from commingling the price fixing charged with the separate unrelated claim of conspiracy to drive Textura out of business by restricting credit terms. See Clark-Schwebel's brief for a full discussion of this point, which we adopt by reference.

. . . could have been deemed rational only if the other parties [sic] to the conspiracy had agreed to act in a similar manner'' (emphasis by the court) (App. 277). Without discussion, the court ruled that the case also had properly been submitted to the jury because of evidence of ''motive,'' ''admissions,'' ''threats'' and ''communications'' by defendants. There was no discussion at all of defendants' additional points that plaintiffs had failed to make out a *prima facie* case as to either the fact or the amount of damages.[6] Notices of appeal were timely filed on May 30, 1975.

STATEMENT OF FACTS

The principal issue on this appeal is whether there was sufficient evidence of a conspiracy—alleged to have begun in March, 1966—to drive Textura out of business, principally by restricting credit and withholding shipments of fabric, to warrant submission of the case to the jury. The facts adduced at trial as to Burlington related almost entirely to this appellant's efforts to accommodate Textura, but also to get its bills paid. While the facts necessarily are discussed to some extent in the argument below, for the convenience of the Court we set out under the present heading a brief summary of the salient, undisputed facts, which demonstrate that Burlington never participated in any plan to destroy Textura but worked diligently and in good faith over the years to preserve a cash-poor customer while at the same time making reasonable efforts to obtain payment for merchandise it sold and delivered to Textura.

1. Burlington's Credit Practices

Burlington conducts 99.9% of its business on credit (Tr. 2092; R. 275). Before credit is granted and orders are filled, the credit worthiness of the customer must be determined (App. 1006, 1043). To do this, credit information with re-

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[6] The Memorandum does not even mention the judge's reversal of his precharge ruling that Dommerich was out of the case (other than a catch-all statement that complaints about the conduct of the trial did ''not merit serious discussion'' (Memorandum, p. 4; App. 280)).

spect to each customer is obtained from (a) other members of the textile industry such as defendants J. P. Stevens & Co. and Clark-Schwebel, (b) private financial institutions such as L. F. Dommerich & Co., the factoring house that purchased Textura's accounts receivable, (c) accounting firms such as the certified accountants utilized by Textura, (d) commercial agencies such as Dun & Bradstreet, Inc., (e) commercial banks, and (f) the customers themselves (App. 1007, 1042).

In determining whether and in what amounts credit should be extended, Burlington relies on the customer's general financial condition, its profitability, its working capital, whether bills are paid promptly (both to Burlington and other suppliers), and whether the customer has outstanding overdue indebtedness (App. 1009).

Throughout the 12-year relationship between Burlington and Textura, credit information was accumulated concerning this account from the above various sources. As early as 1958, Burlington began obtaining financial information from Textura's accountants (App. 325). Later, Burlington's credit personnel consulted with the factoring firm (Dommerich), which purchased Textura's accounts receivable, about plaintiff's financial and credit position, and provided information concerning its own experience with the account to (and received similar data from) the defendants in the present case. It is not disputed that the collection and dissemination of such information is absolutely necessary to permit a meaningful determination to be made by Burlington's Credit Department as to the credit worthiness of its customers (App. 1007, 1042-44).

2. Textura's Poor Financial Condition

Textura [7] was in business from 1954 to 1966 (App. 303, 469) and over that period on a combined basis *lost* approximately $60,000 (App. 1811). Its operating income hit an all time low in 1964 when it lost about $100,000 from its operations (*id*). As Mr. Powrie testified, these companies

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[7] Including its predecessor corporation, Glass Fabrics, Inc.

had a thin financial structure and never had enough cash to work with (App. 513-15). The thin financial structure was reflected particularly in Textura's working capital (the difference between current assets and current liabilities), which is one of the best measures of a company's ability to pay its debts as they mature (App. 753). Between 1962-63—two of the few years when Textura actually made a small profit (App. 1811)—and the time it went out of business in December 1966, the ratio of Textura's current assets to current liabilities never remotely approached Burlington's "rule of thumb" concerning this financial indicium (current assets should exceed current liabilities by 2 to 1) (App. 1330, 1336, 1343, 1350, 1009-10).

Textura's general financial condition (including the amounts of money owed to appellant Burlington) during the four years immediately preceding its collapse is depicted in the following table:

TEXTURA'S FINANCIAL CONDITION
(By Years: 1962-1965)

Date	Total Sales	Total Accts Payable	Accts Payable Burlington	Working Capital	Net Profit (Loss)
	($)	($)	($)	($)	($)
12/31/62	889,167	155,071	61,990	49,726	40,091
12/31/63	1,108,687	163,940	53,598	71,736	49,285
12/31/64	1,061,693	217,059	56,420	(98,650)	(113,788)
12/31/65	1,412,986	329,803	72,743	(50,906)	(31,195)

SOURCES: Textura's Audited Financial Statements (App. 1330, 1336, 1343, 1350, 1362, 1374, 1383; also 1578, 1628).

Note: No audited financial statement was issued by Textura for 1966. The assignment for the benefit of creditors was made on about December 10, 1966.

3. Textura's History of Late Payment of Bills

Textura's financial situation resulted in a history of long delays in the payment of its bills. In 1958 payments were made to Burlington in cash and this practice continued

through March of 1959 when Burlington started selling to Textura on "regular" terms (net due within 30 days of date of invoice) (App. 1898, 1014, 1016).[8] In June of 1960, Mr. Powrie sought 90 day terms, a request to which appellant Burlington did not accede, but it did allow payments to be made within 60 days (App. 1877, 1017-22). However, as these terms were extended, the time in which Textura's bills were actually paid continued to increase.

In the latter part of 1959, payments were usually 30 days late (App. 1017); later, when 60-day terms were in effect, payments slipped well beyond 90 days, exceeding 140 days on occasion by 1965 (App. 1898, 1578). In April of 1965, after "staggering" losses in 1964 and after consultation with Textura's accountants, appellant Burlington obtained a commitment from Textura that every effort would be made to make payments within 90 days and to work toward eventual prompt payment (*i.e.*, 60 days) (App. 1880). By December 1965, when Textura was still on 60-day terms, payment was being made in excess of 100 days (App. 1578). Indeed, Textura continued to make late payments to Burlington until it went out of business in December, 1966, owing Burlington about $17,000 (App. 1578).

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[8] At about the same time Burlington established a policy of billing Textura for goods only when they were called out of the warehouse. As Mr. Powrie described the practice, defendants would weave and store fabric until it was needed (App. 314, 333). Mr. Powrie also testified that he had made an oral arrangement in 1958 with the since deceased Mr. Clark of the Burlington sales department permitting extended-payment terms once the goods were called out, giving Textura "up to three months, up to four months" to pay its bills (App. 313-14, 337-38). This "agreement" with Burlington was not reduced to writing, according to Powrie, because Burlington did not want other customers to find out about it (App. 338), and, notwithstanding the "agreement", Textura continued to pay cash until 1959. Nor was Burlington's *credit* department (which had sole responsibility in setting the credit terms for customers) ever told of any such "agreement" (App. 541).

4. Burlington's Efforts to Obtain A Personal Guarantee

As a result of the poor financial condition described above, Burlington from time to time sought the written, personal guarantee of Textura's president and principal stockholder (Mr. Powrie) that the indebtedness to Burlington would be paid (App. 542, 543-44, 546-55, 1012-14, 1023-25).[9] For example, in late 1957, pursuant to its policy App. 1011), Burlington requested (but was refused) a personal guarantee from Textura's stockholders, including Mr. Powrie (App. 1825). The request was renewed, unsuccessfully, in 1958 (App. 1875), in 1962 (App. 1879), and in 1964 (App. 1826, 1028), a time when Textura was in particularly difficult financial straits (App. 1898, 1330) and was far behind in its payments to Burlington.

Following severe losses at the end of 1964, Mr. Powrie finally agreed in April of 1965 to give his personal guarantee of payment to Burlington (App. 545, 1882). While the guarantee was to expire at the end of the year, Mr. Powrie undertook to work toward eventual prompt payment (App. 1880).[10]

5. Burlington's Credit and Sales Activity in 1966

a) Efforts to Renew the Personal Guarantee

By December of 1965, notwithstanding Mr. Powrie's promise in April, Textura's payments had not become more

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[9] Burlington was also concerned that Textura, in order to generate cash, found it necessary to factor its accounts receivable (App. 1877). The factoring agreement between Textura and Dommerich provided that the latter, for a fee, would advance Textura 90 cents on each dollar of an invoice purchased, with part of the balance held as a cash reserve by Dommerich against uncollectible invoices (App. 316-17).

[10] In June of 1965 (about a year before the conspiracy allegedly began) Burlington learned in an exchange of credit information with appellant Clark-Schwebel that Textura was also late in making payments to it, had taken an unsecured advance from its factor, Dommerich, and that Textura was late in making payments to Stevens (App. 1421).

prompt (App. 1578), and Burlington, as noted, had learned that Textura was late in making payments to other suppliers and had taken an unsecured advance from its factor, Dommerich. Accordingly, Burlington decided immediately to seek a renewal of Mr. Powrie's guarantee in 1966 and to try to hold the account to 60-day terms. On January 5, 1966, months before the alleged conspiracy began on March 1, Burlington sought a renewal of the personal guarantee (App. 1883, 1427).

Textura's 1965 financial statement, which even Mr. Powrie agreed looked "horrible", showed another loss of $31,195 and *minus* working capital of $50,906, thereby confirming the need for renewal of the personal guarantee. While Burlington personnel understood as early as January 5, 1966 that Mr. Powrie had promised to renew the guarantee (*see* App. 1883-86, 1401), and the renewal forms were actually forwarded to Mr. Powrie on May 3, 1966 (App. 1458), they in fact were never signed or returned.

Burlington throughout this period continued to ship goods to Textura on credit on existing contracts, but also continued to try (with some small success) to get Textura to make its payments more promptly. In April and May Burlington also held up credit approval (later granted) on certain *new* contracts placed by Textura, including contracts for further production of the "Crown" and "Satin Boucle" styles, fabrics about whose quality Mr. Powrie began to complain at precisely the time Burlington was seeking a renewal of the personal guarantee and Mr. Powrie was resisting such renewal (App. 1885-90, 1401, 1458, 1471). These contracts were subsequently approved by the Burlington Credit Department and weaving was commenced in August 1966 (App. 1537).

b) Burlington's Knowledge of Clark-Schwebel's Actions, Including the Arbitration Proceeding

In early 1966, following the huge losses of Textura in 1965, Textura unilaterally took a $30,000 credit (based on alleged quality defects) against the amounts it then owed

defendant Clark-Schwebel. In response, and after investigation of the quality claims, Clark-Schwebel on March 1, 1966, revoked Textura's line of credit, placed plaintiff on a cash basis, and demanded payment of all amounts claimed by Clark-Schwebel to be due and owing (about $92,000) (App. 1453).

Burlington learned of these actions *for the first time* on June 8, 1966, when Mr. Nordheim of Clark-Schwebel was contemplating filing an arbitration suit against Textura in the amount of approximately $90,000 (App. 1488).

After learning that the arbitration (successful prosecution of which could have ruined the financially thin Textura) had in fact been filed by Clark-Schwebel, Burlington decided to continue to withhold credit approval of certain new orders (including the April and May "Crown" and "Satin Boucle" contracts) unless Mr. Powrie would personally assure payment of the new orders (App. 1891). Burlington's Credit Department continued to allow shipments on the *old* contracts on credit and the sales department actually started weaving some of the new orders at its own risk! (App. 901, 1537).

c) Settlement of the Arbitration

During the period June 8, 1966 until the dispute between Clark-Schwebel and Textura was settled, Burlington's Credit Department on four occasions had communications with personnel at Clark-Schwebel concerning the status of the arbitration (App. 1494, 1496, 1500, 1508). Toward the end of July (while Mr. Powrie was in New York for a settlement meeting with Clark-Schwebel), Mr. Powrie testified that he met with Mr. Schutz, then head of the Burlington Credit Department, who told Powrie that unless the arbitration with Clark-Schwebel could be settled Burlington probably would not be able to continue Textura on an open line of credit (App. 434).

Following negotiations between Powrie of Textura and Schwebel and Nordheim of Clark-Schwebel, the arbitration in fact was settled, on a basis which Mr. Powrie informed Burlington was totally satisfactory and with which he could "live" (App. 1893).

Thereafter, Textura's fabric requirements from Burlington were reviewed and new contracts extending into 1967 were accepted by Burlington's Credit Department (App. 1537).

d) Textura's Quality Claims Against Burlington

In April and May, 1966—the very same months Textura was submitting two new contracts for "Crown" and "Satin Boucle"—Mr. Powrie lodged substantial quality complaints with Burlington concerning principally these same two styles. See App. 1466. It is undisputed that Burlington had always had difficulty in weaving these styles (losses or "seconds" typically ran about 5% of production) but in April and May Powrie was claiming for the first time that as much as 15% of these styles was unusable.

Powrie proposed that Burlington promise to ship only first quality unfinished fabrics [11] to his finisher in Los Angeles. Burlington could not make such a promise since many defects are either caused by the finishing process itself or are latent and do not appear until finishing is complete (App. 1891). Further, Powrie proposed to deduct at full cost (including the cost of finishing) all goods having quality defects beyond a certain maximum percentage, with goods in this category to be determined *solely* by Mr. Powrie. Burlington rejected this proposal (App. 896, 898, 1891).

On June 6, 1966, Mr. Powrie cancelled all new orders for new styles of fabric until the quality problem could be resolved. After receipt of the cancelling letter and in response to it, the Burlington sales department temporarily stopped processing the Textura orders on which weaving had not begun (App. 900). As Mr. Powrie testified, he was informed of this action on June 13, 1966, but was further informed on June 22 that Burlington would continue to do business on the basis of the quality adjustment policy applicable to all customers and that the new orders would be

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[11] Raw (or "greige") fiber glass fabrics have to be run through a heating or finishing line and then dyed before suitable for use as decorative fabrics.

processed on this basis (App. 1649).

This matter was resolved at about the same time the arbitration with Clark-Schwebel was settled, and by not later than August 25, 1966, Burlington had accepted Powrie's orders for the following fabrics:

20,000 yards of Crown (Style 6011)
10,000 yards of Satin Boucle (Style 94622)
5,000 yards of New Vista (Style 6125)
8,000 yards of Homespun (Style 6130, formerly woven for Textura by Clark-Schwebel)

In fact, all of the merchandise (except Crown) had been woven and was in inventory as of August, 1966 (App. 1537), and weaving on the new "Crown" contract commenced immediately (App. 1895, 1537). By November 14, 1966, Burlington had in inventory subject to Textura's order on 60-day credit terms more than 71,000 yards of fabric designed especially for Textura, including 5,500 yards of "Crown" (with 11,000 yards of this fabric in the process of being woven) (App. 1895).

6. Termination of Textura by Dommerich

Meanwhile, Textura's factor, Dommerich, had independently and for its own reasons decided to terminate its agreement with Textura—as it was entitled to do upon 60 days notice—and notice of the termination was given to Textura on about August 10, 1966, effective October 10, 1966.[12] (*See* App. 463-64, 1651.)

In anticipation of the termination, Dommerich in June or July had begun to build up a protective cash reserve in the Textura account against anticipated losses and by July or August this reserve amounted to $84,000 (App. 1532, 466-67). As Mr. Powrie testified (before the trial court ruled that there had been no showing that Burlington or Clark-Schwebel had been involved in any way in the termination), cancellation of the Dommerich contract and

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[12] This date was extended until December but during the extension Dommerich was advancing Textura only 50 cents on every dollar of invoice value (App. 1527).

the withholding by the latter of about $84,000 of Textura's funds as a reserve deprived Textura of the cash to operate with and it could not pay its bills (App. 466-67).

Unable to find another factor and with no money to pay appellants or other creditors, Textura made an assignment for the benefit of creditors on December 10, 1966 (App. 469).

ARGUMENT

Introduction and Summary

Admittedly, an adverse jury verdict and a district court's sweeping (albeit cavalier and cryptic) denial of post-trial motions would seem, on the face of it, to weigh rather heavily against the chance of reversal on appeal. Nevertheless, we believe that a review of the record below in the present case—granting plaintiff the benefit of all *fair* inferences [13] but considering all of the evidence [14]—will demonstrate that the district court misconstrued and ignored applicable principles concerning the law of conspiracy and sent a case to the jury that could result in a verdict against Burlington only on the basis of uninformed surmise and sheer guesswork. The result has been a gross miscarriage of justice which must be corrected by this Court. Review of the proceedings below will also reveal some highly unusual procedural defects, including the disappearance of the judge during the trial and the errors apparently attributable thereto, entitling appellants at the minimum to a new trial.[15]

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[13] Fortunato v. Ford Motor Co., 464 F.2d 962, 965 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972).

[14] Stief v. J. A. Sexauer Mfg. Co., 380 F.2d 453, 455 (2d Cir.), *cert. denied*, 389 U.S. 897 (1967); *see also* Boeing Company v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (*en banc*); 5A Moore, Federal Practice ¶ 50.02[1], at 2320 (1974).

[15] The changed attitude of the trial court following his disappearance is shown most dramatically in his almost complete about-face in connection with rulings on the jury charges proposed by the parties and the charge actually given. These procedural errors are described and argued fully in the separate brief filed by appellant Clark-Schwebel.

In its broader aspects, the case involves the extent to which suppliers who sell goods on credit can collect financial information about customers who buy on credit and then act on such information without being charged with implied conspiracy under the antitrust laws.

Not since the *Cement Manufacturers'* case in 1925,[16] to our knowledge, has it been suggested that the exchange of such information—even among competitors who have common customers—followed by action reasonably dictated by the reliable information thus revealed, could constitute a restraint of trade and violation of the antitrust laws subjecting the creditor to civil or even criminal penalties. As the Supreme Court there held (and reaffirmed in *United States* v. *Container Corp.*, 393 U.S. 333, 335 (1969) (emphasis added):

> The gathering and dissemination of [credit] information which will enable sellers to prevent the perpetuation of fraud upon them, which information they are free to act upon or not, as they choose, cannot be held to be an unlawful restraint upon commerce, *even though, in the ordinary course of business, most sellers would act on the information, and refuse to make deliveries for which they were not legally bound.*[17]

Yet the district court in the present case—while tacitly accepting the *Cement* premise—has held that such credit activity raises issues of conspiracy to be resolved by the jury if, following such activity, there is any change in the credit treatment of the common customer by one or more of the parties to the exchange.

More specifically, our position—fully supported by *Cement* and numerous other decisions—is that every act of Burlington, relied upon as circumstantial evidence of this appellant's participation in a conspiracy, reasonably could have been expected (indeed, compelled) in the absence of

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[16] Cement Manufacturers' Protective Ass'n v. United States, 268 U.S. 588, 603-04 (1925).

[17] The present case is even stronger for defendant because, as we show below and as Mr. Powrie himself testified, Burlington never refused to make deliveries on credit.

any agreement with Clark-Schwebel. Such conduct, fully consistent with Burlington's own individual business interest on the hypothesis of independent behavior, cannot as a matter of law provide the basis for a finding of conspiracy. To send such evidence to the jury is openly to invite the triers of fact to engage in rank guesswork.

Moreover, in point of fact, Burlington's basic credit decisions (to seek a renewal of Mr. Powrie's personal guarantee in 1966 and to try to hold the account within 60-day payment terms) were made substantially in advance of the first alleged "conspiratorial" exchange of credit information and before Burlington had even learned of Clark-Schwebel's actions (placing Textura on a cash basis and bringing an arbitration proceeding on past due accounts).

The district court attempted to support its decision to send the "credit conspiracy" issue to the jury by conclusory references to certain other peripheral factors, sifted from the interstices of a twelve-year business relationship between Burlington and its now bankrupt former customer, Textura. The court's opinion contains absolutely no discussion or analysis of these other factors and refers to them only in conclusory terms (adopted almost verbatim the plaintiff's post-trial brief). Apparently, however, these "other factors" included: 1) the credit exchanges themselves;[18] 2) a "motive" by Burlington to drive Textura out of business perceived by the court in "complaints" received by Burlington over a four-year period from other purchasers of the same product about the way Textura did business (*i.e.*, selling direct to apartments and office buildings, thus by-passing the customary middleman in the trade); 3) "admissions" and "threats" (including the isolated, single statement by a Burlington employee *two years before Textura's bankruptcy* that he would rather not do business with Textura); 4) delays from time to time in the shipment of merchandise; and 5) occasional comments

[18] While the court agreed that credit exchanges as such are lawful, it contradictorily relied upon these same exchanges as another factor ("constant communication") which would permit the jury to find a conspiracy.

of inferior merchandise (on which, it is undisputed, Burlington always made satisfactory adjustments).

Notwithstanding these "other factors",[19] all of which appear to be wholly unexceptionable business events, there can be no doubt that the core of the case involved the credit activity of defendants, principally during the "conspiracy" period (March 1, 1966 until Textura's bankruptcy in December of 1966). The overwhelming majority of testimony and documentary evidence presented on the "credit conspiracy" issue related to the exchange of credit information between defendants and their credit and related sales activities during the "conspiracy" period (March 1, 1966 to December, 1966). It would amount to the most blatant kind of bootstrapping to allow these trivial and in many cases ancient "other factors"—whose connection to the main activity complained of can be reached in most instances only by surmise—to convert plainly lawful activity into an illegal conspiracy. We fully appreciate, of course, that the nature and effect of an alleged conspiracy is not to be viewed by dismembering it and viewing only its separate parts. But if the whole becomes so much greater than the sum of its parts as to compel the conclusion that a finding of conspiracy rests on speculation or mere suspicion, then the verdict must be set aside. This is such a case.

We turn in Part I of the Argument to a discussion of the district court's erroneous finding that defendants Burlington and Clark-Schwebel took "*similar* or *parallel*" actions (court's emphasis) sufficient, with these other factors, to support a finding of conspiracy. Next, we discuss the court's cognate (and incredible) finding that Burlington's actions in trying to get its bills paid were "in contradiction to [its] self-interest" and could be "deemed rational only if the other parties [sic] to the conspiracy had agreed to act in a similar manner." Also in Part I we show that the so-called "other factors" cannot support the decision to

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[19] Including hearsay statements by other defendants not chargeable against Burlington in the absence of independent evidence of conspiracy and with no showing that they were made in furtherance of such a conspiracy.

allow this case to go to the jury and it was error to deny defendants' motions for a directed verdict.[20]

Parts II and III of the Argument demonstrate that plaintiff failed to make out a *prima facie* case either as to the fact or the amount of damages. As to the former, there can be little doubt (as Textura's president testified) that the cause of Textura's demise was its chronic shortage of cash, which finally became fatal when Textura's factoring arrangement was independently terminated by L. F. Dommerich, Inc. in circumstances not involving any of the defendants. As to the amount of damages, plaintiff presented "expert" projections predicting that Textura—which during the two years immediately preceding bankruptcy had suffered a net *loss* of about $150,000—would be earning upwards of $50,000,000 annually by 1976. Plaintiff's alternative, less grandiose theory of damages—that Textura would earn profits on the order of $1,000,000 during the next ten years—had no competent foundation in the evidence and was based strictly on the arguments of counsel.[21] For these reasons, too, the verdict must be set aside.

I. There Was Insufficient Evidence Of A Conspiracy To Warrant Submitting The Case To The Jury

A. The District Court Erred in Holding That Burlington Pursued a Similar and Parallel Course of Conduct with Clark-Schwebel

As already discussed, plaintiff has argued throughout—and the district court charged the jury—that the alleged

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[20] "A directed verdict is a device to save time and trouble involved in lengthy jury determination. It is something more. It is a method for protecting neutral principles of law from powerful forces outside the scope of law—compassion and prejudice" (Rutherford v. Illinois Central R.R., 278 F.2d 310, 312 (5th Cir.), *cert. denied*, 364 U.S. 922 (1960)).

[21] Indeed, during deliberations on the damages phase of the case, the jury—in addition to requesting that the entire charge on damages be re-read (App. 1277)—asked that the "last half hour of [plaintiff's counsel's] summation" dealing with damages also be re-read (App. 1278), a request that Chief Judge Edelstein said he had never before received in 25 years on the bench (*id*).

conspiracy began on about *March 1, 1966,* when Clark-Schwebel placed Textura on a cash basis and demanded payment on all outstanding contracts. There are two vital points here, established by uncontradicted evidence, which the district court failed to perceive: *First,* long before March 1, 1966 (and certainly before June 8, the date Burlington first learned of Clark-Schwebel's March actions), Burlington had *already* independently formulated its credit and sales policies with respect to Textura and they did not change in any significant respect during the alleged conspiracy; *second,* Burlington's policies (to extend credit to Textura at all times, to accept new orders, to make satisfactory quality adjustments, etc.) were fundamentally different from those of Clark-Schwebel (after March 1, 1966 *never* to extend further credit but to require cash before delivery and to make inadequate adjustments—according to Mr. Powrie—on quality claims).

These basic points totally undermine the district court's finding—crucial to its decision to send the case to the jury —that Burlington and Clark-Schwebel acted in such a "*similar* or *parallel*" way (Memorandum, p. 3; App. 279) (emphasis by the court) as to raise inferences of joint conduct. As we show below, however, Burlington *on or before the following dates* had independently made its own policies as follows:

1) On *April 2, 1965,* to require Mr. Powrie's personal guarantee that Textura's indebtedness to Burlington would be paid during the balance of 1965 (App. 1880);

2) On *April 2, 1965,* to seek payment of its bills from Textura within 90 days of the date of the invoice and to work towards eventual prompt payment (*i.e.,* 60 days) (*id.*);

3) On *December 30, 1965,* to hold up shipments if Textura did not pay its bills within 60 days of the date of the invoice (App. 1427);

4) On *January 5, 1966,* to seek a renewal of the personal guarantee for 1966 (App. 1883);

5) In *March* and *April, 1966* (before learning of Clark-Schwebel's credit decision), to withhold credit approval of

certain *new* contracts in the absence of the personal guarantee (including the fabric "Crown") but to continue to ship on existing contracts (including "Crown") (App. 1867).

The fact that Burlington's credit and sales decisions had been implemented and communicated to Powrie (see, *e.g.*, App. 1867) *before* the first allegedly conspiratorial credit exchange clearly emerges from the history of the relationship between Burlington and plaintiff prior to and during the period of the alleged conspiracy.

1. *Burlington's Credit and Sales Decisions Were Made and Implemented* Prior *to the "Conspiracy" and Never Significantly Changed*

a) Burlington's Credit Decisions Historically Were Based on Textura's Financial Condition and Its Record of Paying Its Bills

Burlington first began selling decorative fabrics to Textura in 1956. During the period 1958 through March of 1959, Textura paid *cash* for the fabrics it purchased since Burlington was not willing to extend the cash-poor and undercapitalized company extended payment terms (App. 1875, 1898). In March of 1959, however, Burlington agreed with Textura that payments could be deferred, on what Burlington considered "regular" terms, for a period of 30 days (App. 1898, 1578). In 1959 Textura's payments slipped 30 days beyond the agreed terms (App. 1016-17, 1898, 1578).

In June of 1960, Textura sought 90-day payment terms, a request which Burlington rejected, but when Textura modified its request, asking for 60 days, Burlington acquiesced (App. 1877, 1017-22). However, commencing late in 1960 and continuing into 1961 and 1962, when Textura was on 60-day terms, payments were being made anywhere between 90 to 120 days (App. 1898).

In an internal memorandum written in March of 1962, a member of Burlington's Credit Department expressed concern that Textura's payments were becoming slower and slower (App. 1878):

> The situation calls for a firmer attitude and I would insist that a substantial amount of additional capital be put back into the business. For continued liberal credit, I think we should also insist on the guarantees of Powrie and his wife.

The "firmer attitude" apparently was not firm enough, however, and in 1963 Textura's payments were running as much as 150 days from date of invoice (App. 1026). Finally, in May of 1964, when Textura's indebtedness to Burlington reached an all-time high ($90,368 on May 21 (App. 1578)), Mr. Powrie was asked for a personal guarantee. Upon his refusal (App. 1028-29, 1826), Burlington in August of 1964 (when Textura owed Burlington more than $70,000 (App. 1578, *supra*)) again asked Textura to pay cash for its goods, but apparently no cash payments were actually made that year (App. 1578).

Textura's timeliness in payment did not substantially improve during 1964 (although the overall amount of the debt was reduced) and 1964 turned out to be plaintiff's worst year financially (App. 1811).

b) Textura's 1964 Financial Disaster and the Granting of Mr. Powrie's Personal Guarantee for 1965

In April of 1965, Burlington received a copy of Textura's 1964 financial statement which showed a net *loss* of $113,000 at year-end 1964 and a *minus* working capital of approximately $100,000 (App. 1343, 1880, 1029-30). Indeed, Textura was in a state of insolvency (App. 1029-30). In view of the admittedly "staggering" losses, Mr. Powrie agreed to execute a personal guarantee for the balance of 1965 (App. 1880). He also agreed to make every effort to keep payments within 90 days and to work toward eventual prompt payments (*i.e.*, 60 days) (*id.*).

Textura, however, was never able to make prompter payments in 1965 and it certainly did not manage to make payments within 60 days as promised. An internal Burlington memorandum written in December of 1965 reflects the status of Textura's account (App. 1790):

> At the present time this account owes $67,000 on terms of net 30 plus 30 [60-day terms] with approximately $14,000 of that amount representing August 4 through August 26th billing. We receive one check a month from this account and essentially they are attempting to pay on roughly a 90-day basis, but it is somewhat beyond that now.

On December 30, 1965, after learning in a conversation with Clark-Schwebel that Textura (a) was in default in repaying a $50,000 overadvance to its factor, (b) listed what was probably a worthless process as a $200,000 asset, and (c) was $53,000 past due in repaying another supplier, Mr. Kelly of Burlington's Credit Department advised other members of the Department (App. 1427) (emphasis added):

> We are selling this account on 60-day terms and it appears to me that until the air is cleared that *we should insist on prompt payments and that you should not make any additional shipments while the account is past due on 60-day terms. . . . I am a little concerned about this account and feel that we should hold up until we know all the answers.*[22]

Thus the basic decision to place Textura on and to adhere to 60-day terms was formulated between April of 1965, when Mr. Powrie promised to improve Textura's record of payments, and December of 1965, well before the commencement of the alleged conspiracy on March 1, 1966. Moreover, on January 5, 1966, after the personal guarantee of Mr. Powrie for 1965 had expired, Burlington immediately sought renewal (App. 1883).[23]

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[22] At about the same time—on May 20, 1965—J. P. Stevens reduced Textura's line of credit because the company's working capital had decreased by about $80,000 during the period February 1964 to March 1965 (App. 1812). There is no claim in this case that these roughly "parallel" actions by Stevens and Burlington in 1965 evidence any agreement or conspiracy, and of course, there could be no such claim in view of Stevens' exoneration by the jury.

[23] While Powrie denied on the stand that he agreed in 1966 to renew the guarantee (App. 552), it is undisputed that Burlington's Credit Department *thought* he had so agreed and its credit deci-

Thus the basic decision to require Textura to pay within 60 days and to seek renewal of the personal guarantee was formulated, expressed to Mr. Powrie, and implemented during the period between April of 1965 and January of 1966, long *before* the conspiracy allegedly began on March 1, 1966. Nor did these policies basically change in any way during the period of the alleged conspiracy so as to permit any inference of collusion with Clark-Schwebel.

c) Further Losses by Textura and Further Efforts by Burlington to Obtain Renewal of the Guarantee for 1966

Notwithstanding repeated efforts, and what Burlington credit personnel understood were clear promises by Mr. Powrie to renew, as of March 1966 Burlington had not been successful in obtaining a renewal of the personal guarantee. As Mr. Donnelly of Burlington's Credit Department stated on March 18, 1966 (App. 1884):

> We have been following, without success, in an attempt to obtain a new guarantee since ours expired on 12/31. Powrie initially indicated we would get this (including Mrs. Powrie's signature) but now asks us to forego this. . . . Points out that he is paying us within the 90-day period and anticipates being able to considerably better this in the future. . . . Told him our New York office felt the guarantee was essential at this time. . . .

At approximately the same time, Burlington received a copy of Textura's 1965 financial statement which showed another operating *loss* of approximately $36,000 (App. 1350, 1033-34), and an additional *deficit* in working capital of approximately $50,000. As Mr. Garvey of Burlington's Credit Department expressed it in a contemporaneous memorandum, this was the "[s]ame deficit working capital position that has existed on and off for the past seven or eight years" (DX BG (R. 323), App. 1035-36).

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sions clearly reflect this understanding. Thus Mr. Donnelly, who frequently met with Mr. Powrie as Burlington's credit representative in Los Angeles, stated on January 5, 1966, that "Powrie has indicated a willingness to sign a new guarantee form to expire 12/31/66 and promises to return this to us shortly (App. 1883).

On April 25, 1966, Mr. Powrie was advised that the personal guarantee was absolutely necessary and once again Burlington thought Mr. Powrie agreed to renew (App. 1885, 1401). The guarantee was not returned, however, and again on May 18, 1966, Mr. Powrie assured a Burlington employee that the guarantee would be forwarded *within the week* (App. 1886). It never was.

d) Burlington Delayed Credit Approval of New Textura Contracts Pending the Personal Guarantee and Before Learning of Clark-Schwebel's Actions

In March and April of 1966, Textura submitted proposed new contracts to Burlington. While awaiting renewal of the guarantee prior to receiving any information from Clark-Schwebel, approval of these new orders was withheld by Burlington's Credit Department (App. 1867). (*See also* App. 1887-90).[24]

On May 18, 1966, the very same day Mr. Cann of the Burlington Credit Department understood Mr. Powrie to say the personal guarantee would be returned "this week", Powrie was informed (by copy of a Burlington memo) that credit approval of the Crown contract had not been granted (App. 1867).[25] Also on this day—May 18, 1966—Mr.

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[24] Powrie testified that in April of 1966 he was "screaming" for Crown (App. 416) and needed 100,000 yards for contracts held by Textura specifying this fabric. But it is clear that Powrie's own "stalling" (App. 1886) on the matter of the personal guarantee was the reason for the delay in credit approval of the new Crown contract, and this approval was withheld long before Burlington learned of Clark-Schwebel's action in 1966 putting Textura on a cash basis. Significantly, plaintiff produced at trial only *one* Textura construction contract in which Crown was specified (App. 1558, 499-502). *But this contract was completed by Textura* before it went out of business, as Mr. Powrie himself testified! (App. 501).

[25] At this time, and continuing until the end of July, Burlington was weaving and shipping Crown on an earlier contract at record levels (11,009 yards in July alone) (App. 1645). In April, 1966, Burlington shipped a total of 45,585 yards of fabrics of all kinds to Textura, the largest single month's volume by far since June of 1963, which doubtless contributed to Textura's large and increasing inventory during 1966 (*id.*; see p. 54, *infra*).

Powrie attempted to avoid having to execute a guarantee, informing the Credit Department that "we are talking to Hess, Goldsmith [Burlington's fiber glass sales division] about placing a substantial portion of our business with them" and pointing out that "no other mill requires the guarantee" (App. 1887).

Thus, it is clear that the delay in credit approval of the Crown contract, which resulted in the unavailability of Crown fabrics in August and September, occurred during a period of time when the Credit Department was negotiating with Powrie about the guarantee, when credit personnel understood Mr. Powrie had promised to execute the guarantee, when no communications with Clark-Schwebel had as yet taken place, and when Burlington did not know what Clark-Schwebel's position was. The unavailability of Crown and the requests for Powrie's guarantee, therefore, could not possibly have resulted from any joint, conspiratorial activity between Burlington and Clark-Schwebel. The only reasonable inference is that Burlington's credit personnel unilaterally and independently held up credit approval of these new contracts pending receipt of the personal guarantee of Mr. Powrie which they understood he had promised to give and on which promise, they also understood, he had reneged (see App. 1889).[26]

On June 8, 1966, Burlington's Credit Department again told Powrie "for the time being the guarantees were needed" (App. 1889), and reminded Powrie of his April 1965 promise to pay on 60-day terms, noting that Textura was still "running 3-4 weeks slow" on that basis (*id.*).[27] Also on June 8, 1966, Burlington learned *for the first time* that

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[26] Actually, the sales department started to weave some of these new orders (but not Crown) on its own risk and without credit approval (App. 1891) and most of the fabrics were in inventory by August (App. 1537). The Crown contract (#7881) ultimately was approved by the Credit Department in August, 1966 and weaving commenced (App. 1537).

[27] In his memorandum of this telephone conversation (App. 1889) Mr. Schutz noted that Powrie had said his new orders were "only tentative" and depended upon resolution of the guarantee ques-

Clark-Schwebel had placed Textura on cash terms and was contemplating an arbitration proceeding over an allegedly past-due account of some $90,000 (App. 1488). On June 14, 1966, after Burlington learned that Clark-Schwebel had in fact initiated an arbitration proceeding against Textura (App. 1891), Mr. Schutz, head of Burlington's Credit Department, noted (*id.*):

> The merchandise we manufacture for this account [Textura] represents confined styles [*i.e.*, woven for Textura alone], and if it was not billed to this customer, in all probability the Sales Department would suffer a loss in selling it to someone else.[28]

Mr. Schutz concluded: "Because of these arbitration proceedings and the special nature of the goods manufactured for this company, before we accept any additional orders, we will have to have the personal guarantee of Mr. and Mrs. Powrie" (*id.*).[29]

In sum, the undisputed facts show that Burlington's basic decisions regarding its credit and sales treatment of Textura had been made at a point in time long before Clark-Schwebel put Textura on a cash basis on March 1, 1966, and long before Burlington learned of that action.[30] According-

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tion. Mr. Schutz stated: "While I've only known Powrie for a little over a year, I have always thought him to be a man of his word and am rather surprised he should now be renegging [sic] on a promise."

[28] Mr. Schutz also noted that Burlington was then holding $11,967 worth of Textura's goods in its Los Angeles warehouse on contracts "that should have been completed about June 1965," or a year earlier (App. 1891). Textura also had not called in 10,000 yards of another style on a contract to have been completed by March of 1966, yet the sales department decided to "give the customer until about 9/30/66 before considering billing [these goods]" (*id.*). Surely this is not the action of a conspirator bent on destroying a customer.

[29] It is undisputed that Burlington continued to weave and to ship fabrics on credit pursuant to existing contracts.

[30] In its post-trial brief, plaintiff conceded that PX 130 (App. 1488), dated June 8, 1966, indicated on its face that this was the

ly, it is clear that the *timing* of Burlington's actions can give rise to no inference of collusion or concerted action with Clark-Schwebel. Nor was there any similarity in the substance of appellants' credit and sales actions *vis-a-vis* Textura.

2. *Burlington's Acts Were Not Similar or Parallel to Those of Clark-Schwebel in Substance*

As discussed above, Burlington learned for the first time on June 8, 1966, of the possibility of an arbitration proceeding between Clark-Schwebel and Textura and that Clark-Schwebel had placed Textura on a cash basis. Notwithstanding this information, Burlington, while concerned, continued to ship goods to Textura *on credit* on existing contracts in undiminished amounts through July, 1966, and continued to ship the important "Satin Boucle" style on credit (4,064 yards in August and 3,260 yards in October, 1966 (App. 1645)).[31]

Moreover, on August 2, 1966, Mr. Powrie advised Burlington of a settlement of the arbitration dispute with Clark-Schwebel and stated that the settlement was satisfacory to Textura (App. 1893). In accordance with Mr. Powrie's

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first time Burlington learned of Clark-Schwebel's decision to put Textura on a cash basis and possibly to file an arbitration action. Plaintiff argued, however, that since Mr. Nordheim of Clark-Schwebel testified his practice was to contact other creditors about major credit problems with his accounts, he just *must* have told Burlington of these actions "at, prior [to] or shortly after their occurrence" (Textura Memorandum, p. 28; R. 282). Such a rationalization, however, is not evidence, particularly when made in face of a contemporaneous document showing quite clearly that Burlington first acquired this information on June 8, 1966.

[31] Powrie and plaintiff's counsel repeated over and over at the trial that there were zero shipments of Burlington's "Crown" fabric in August and September, 1966. As already noted, however, this resulted from the withholding of credit approval of a new Crown contract beginning in March or April, 1966, *before* Burlington learned of Clark-Schwebel's actions and thus could not possibly have resulted from any agreement with Clark-Schwebel based on conscious parallelism or otherwise.

understanding of Burlington's position on the arbitration matter (*i.e.*, if settled on a basis not interfering with Textura's ability to pay its bills to Burlington the latter would forego the personal guarantee requirement), the matter of the personal guarantee was dropped (App. 1893). Accordingly, on August 10, 1966, the head of Burlington's Credit Department and Mr. Powrie discussed the status of Textura's pending orders. Mr. Powrie's position was "he would write . . . as to which merchandise he would like to have over what period of time, and then . . . [Burlington] could decide whether or not . . . to accept the orders on that basis" (App. 1894).

Mr. Powrie submitted his proposal as to fabrics he needed on August 15, 1966 (App. 1045-47) and by August 25, 1966, Burlington's sales department agreed to accept and weave *all* of Textura's orders (App. 1537). Burlington's Credit Department "advised the sales department that we are going ahead with this account, we believe, for the next quarter and whether or not we continue after that depends on the customer's performance both as to paying us promptly and as to making some money" (*id.*). Mr. Powrie was informed by Burlington that "we expect him to pay promptly on 60 days and his performance as to payments would affect our decision as to whether or not we wish to take future orders" (App. 1537).[32]

By contrast, during this entire period of time, Clark-Schwebel was refusing to sell to Textura except *for cash* and was making no deliveries! Other differences in treatment are as follows:

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[32] By November 14, 1966, Burlington had 71,500 yards of fabric in inventory for Textura and was in the process of weaving 11,000 more (App. 1895). Burlington was willing to give credit approval on new orders which required delivery in 1967 (*id.*). When Textura went out of business, Burlington had 82,000 yards of fabric woven specially for Textura in its inventory (App. 1791).

(1) While Clark-Schwebel never made quality claim adjustments satisfactory to Textura after October, 1964 (App. 371), by Powrie's own admission Burlington *always* made satisfactory adjustments on such claims (App. 412-13, 520), allowing Textura either to return the merchandise or take a credit against outstanding bills. In fact, Burlington continued to do so as late as November 29, 1966 (less than one month before Textura filed bankruptcy proceedings), when it agreed to take back substantial amounts of yardage shipped on two contracts that Powrie claimed were unusable (App. 1809). This was "satisfactory" to Mr. Powrie (App. 511-12; see also App. 1531).

(2) While Clark-Schwebel refused to weave new contracts for Textura after March 1, 1966, Burlington continued to undertake weaving new contracts. On March 4, 1966, Clark-Schwebel refused to weave "Morro" for Textura until the Clark-Schwebel/Textura dispute was resolved (App. 1454); Burlington, however, agreed with Powrie to weave that fabric for Textura (App. 423). A sample weave was run on this style but Powrie lost interest in it (App. 427) and never submitted an order for it. Similarly, Mr. Powrie asked Burlington to weave "Homespun," a fabric formerly woven by Clark-Schwebel; Burlington did so (App. 1867) with the result that when Textura went bankrupt Burlington was left with 23,843 yards of Homespun in inventory (App. 1791, 511-12).

(3) While Clark-Schwebel billed Textura for all specially manufactured goods in inventory on March 1, 1966 (App. 1453), Burlington never changed its policy of allowing Textura to store its fabrics, without charge, in Burlington's warehouses and not billing Textura for them until Textura called them out. In fact, as late as June 30, 1966, Burlington decided to give Textura another 90 days to call out goods that by the terms of the contract should have been ordered no later than March, 1966 (App. 1891).

Summarizing on this point, there can be no doubt that the acts of appellants were substantially dissimilar in nature: Clark-Schwebel refused to sell to Textura on credit after

March 1, 1966, but Burlington continued to offer 60-day terms; Clark-Schwebel refused to ship on existing contracts except for cash after March 1, 1966, but Burlington continued to ship on 60-day terms; Clark-Schwebel billed Textura on March 1, 1966, for all goods Clark-Schwebel was holding in its warehouse, but Burlington continued to give Textura additional time to call out goods Burlington was holding; Clark-Schwebel at all times failed to make quality adjustments, but Burlington continued to make full and satisfactory adjustments throughout Textura's existence; Clark-Schwebel refused to weave new fabrics for Textura after March 1, 1966, but Burlington agreed to and did weave new fabrics including two fabrics formerly woven by Clark-Schwebel.

Clearly, therefore, the district court erred in concluding that the conduct of Burlington and Clark-Schwebel was sufficiently "*similar* and *parallel*" (court's emphasis) to support a finding of conspiracy. At the minimum, the acts of Burlington and Clark-Schwebel did not entail such "complexity, originality, unanimity, or exacting correspondence" as to permit an inference of conspiracy (*Overseas Motors, Inc.* v. *Import Motors Ltd., Inc.*, 375 F. Supp. 499, 535 (E.D. Mich. 1974), *aff'd*, 1975 Trade Cas. ¶ 60,340 (6th Cir. June 2, 1975). It is axiomatic, as the Court held in the leading case of *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F. Supp. 743, 746-47 (N.D.Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), where defendants' motions for directed verdicts were granted, that:

> In deciding whether evidence of defendants' conduct can reasonably support an inference of conspiracy, *there must be more than mere general similarities; there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action.*

Moreover, even if the acts and practices of appellants in the present case were deemed, contrary to undisputed fact, to be generally similar, no inference of conspiracy would be permissible unless the conduct adopted appeared to be contrary to the business self-interest of each appellant on

a theory of independent behavior (*i.e.*, if it would not be reasonable to expect Burlington to act the way it did in the absence of an agreement with Clark-Schwebel). This raises the second major error of the district court.

B. The District Court Erroneously Held That Burlington's Acts and Practices Were Contrary to Its Business Interest

The lower court apparently recognized that even if the acts and practices of Burlington and Clark-Schwebel were similar, that alone would not be enough to send the case to the jury. Accordingly, the court concluded—contrary to the evidence, we submit—that defendants had acted contrary to their individual self-interest on an hypothesis of independent behavior (Memorandum, p. 3; App. 279) (emphasis added):

> Plaintiff has shown restrictions of Textura's credit, cessation of deliveries, refusals to process orders, demands for personal guarantees, all of which were effected *in apparent contradiction to defendants' self-interest and all of which could have been deemed rational only if the other parties to the conspiracy had agreed to act in a similar manner.*

In the first place, the court's reference to "*other parties*" to the conspiracy demonstrates that the court substituted its own findings for those of the jury. This case was tried on plaintiff's theory that, in addition to Clark-Schwebel and Burlington, participants in the conspiracy included another manufacturer (J. P. Stevens) and plaintiff's factor (Dommerich). However, the jury found that J. P. Stevens was not a party to any conspiracy and the court itself ruled that there was no evidence that Dommerich was a co-conspirator, leaving a *total* of *only two* "conspirators". The jury's acquittal of Stevens and the exclusion of Dommerich from the case entirely undercuts both plaintiff's theory and the district court's finding that defendants' conduct was "rational only if the other parties to the conspiracy had agreed to act in a similar manner." As plaintiff argued in its trial brief (R. 321, at p. 48) (emphasis added):

> That these actions . . . [by Burlington] was [sic] consciously taken pursuant to agreement is obvious from the fact that unless the other defendants were restricting Textura's ability to obtain goods from them, Burlington's [actions] would have simply resulted in a transfer of sales from Burlington to Stevens or Clark-Schwebel. Burlington could act confidently, however, relying on the other defendants' tacit or express agreement to similarly limit Textura.

Since, as the jury found, Stevens did not conspire against Textura, Burlington could not "act confidently" or "rely" on Stevens and therefore it would be totally *irrational* for it to conspire solely with Clark-Schwebel, for that "would have simply resulted in a transfer of sales from Burlington to Stevens. . . ." (a much larger company than Clark-Schwebel, by the way).

In any event, there is absolutely no basis for the district court's incredible conclusion that Burlington's actions—as described above on the basis of undisputed evidence of record—were taken in apparent contradiction to its own business interest. It is absurd on its face to suggest—as in the matter of the personal guarantee, for example—that efforts to assure payment of bills from a customer teetering on the brink of bankruptcy are against self-interest. While *in the abstract* a seller may not appear to act in its self-interest when it restricts the level of goods shipped, it is clear that any rational seller seeks not simply to deliver more and more goods, but to deliver goods and receive payment for them. It cannot be contrary to a seller's self-interest to refuse to ship goods to a customer whose financial plight and problems reasonably portend non-payment.

Nor can acts contrary to self-interest be found in the phantom issues of poor quality and alleged refusals by Burlington to weave new styles of fabrics.

As to quality, it should be noted in the first place that the unusual nature of fiberglass and the problems encountered in weaving it into decorative fabric have *always* resulted in quality problems not encountered in weaving fabrics from yarn made of other materials. This much is undisputed. As Mr. Powrie himself testified, he "had an on-going

quality problem that we lived with from the first day we bought from [each of the defendants]'' (App. 368), including Burlington (App. 402).

Second, as pointed out above, it is undisputed that Burlington *always* made satisfactory adjustments on Textura's quality claims (App. 413, 520), allowing Textura either to return the merchandise or take a credit therefor. (*See* App. 1809, 1534, 511-12). Surely, if Burlington sought to destroy Textura by delivering inferior goods, it would not, *on every occasion,* turn around and give Textura *full credit* for unsatisfactory merchandise.

Third, plaintiff argued that Burlington refused to weave certain Textura styles (Morro and Homespun) formerly woven by Clark-Schwebel. The uncontradicted evidence, as described above, shows that Burlington *did* agree to weave a sample run of Morro (App. 1867) in about May of 1966, but Powrie never requested a contract on this item. According to Powrie, Morro ''kind of faded out of the picture'' and in July he placed an order for Morro with Stevens (App. 426-27). Stevens, however, decided not to produce this fabric because of weaving difficulties.[33]

Finally, as to Homespun, the record shows that Burlington *did* accept an order in May, 1966 for 25,000 yards of this fabric which formerly had been woven by Clark-Schwebel (App. 1867, 897). Substantial quantities of this fabric (Style 7897) were woven, but not called out by Textura, with 25,000 yards in Burlington's inventory as of August 25, 1966 (App. 1537). It was not until November 1966 that Powrie ''discovered'' these fabrics had ''the wrong weave'' (App. 1538) *whereupon Burlington released Textura from the contract* (App. 1809).

Thus, far from showing conduct contrary to Burlington's self-interest, the evidence shows that Burlington made every reasonable effort to produce and ship merchandise to Textura and, of course, to get paid for it. Such conduct cannot be contrary to business self-interest and each act of

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[33] The jury obviously did not believe Stevens' failure to weave Morro was the result of any conspiracy.

Burlington reasonably could have been expected in the absence of any agreement or conspiracy with Clark-Schwebel. Indeed, most, if not all of these acts, were flatly antithetical to the existence of a conspiracy.

While ignored by the court below, the law is clear on this point. This Court recently upheld the principles we rely upon in affirming summary judgment for defendants in *Modern Home Institute, Inc.* v. *Hartford Accident and Indem. Co.*, 513 F.2d 102 (2d Cir. 1975), *aff'g Romac Resources, Inc.* v. *Hartford Accident and Indem. Co.*, 378 F. Supp. 543 (D.Conn. 1974). There, plaintiffs alleged that twelve defendant insurance companies conspired to refuse to purchase plaintiffs' lists of policy expiration dates, as evidenced by their parallel refusals to deal. On the point of self-interest, plaintiff contended that defendants would have derived great economic advantage from doing business with it and that "it would be in the individual self-interest of each company to reject [plaintiff's business] only if all the others did so too." (*Id.* at 111).

This Court (per Mansfield, J.) noted that while "[s]uch actions, only in one's self-interest if done in concert with others" may provide the basis for an inference of conspiracy, plaintiff had failed to overcome defendants' evidence that to do business with plaintiff would entail excessive costs and uncertain benefits. Accordingly, the Court affirmed summary judgment for defendants and concluded (*id.* at 110):

> The mere fact that all defendant companies were initially enthusiastic about plaintiffs' proposal and then rejected it, *even if they knew the other defendant companies were doing likewise, is not enough to defeat the motion for summary judgment.* [Citations omitted] *Such parallel conduct is consistent with independent competitive decisions....*

Similarly, in *Hallmark Industry* v. *Reynolds Metal Co.*, 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974), plaintiff Hallmark (an independent contractor) alleged that two aluminum manufacturers conspired with another contractor (Stanray) to prevent plaintiff from obtaining sufficient aluminum to perform a contract it had obtained.

Plaintiff Hallmark demonstrated that it had won the bid on a contract with the Army for the construction of prefabricated huts, on which the next lowest bidder was Stanray, another contractor. Plaintiff further showed that (1) defendants Reynolds and Stanray had met prior to the submission of the prefabricated hut project; (2) Stanray was annoyed that Reynolds submitted its own bid on the contract; (3) Reynolds assisted both Hallmark and Stanray in preparing their bids; (4) Stanray contacted Reynolds to learn the nature of Reynolds' efforts to aid Hallmark; (5) Reynolds thereafter, as a condition to doing business with plaintiff, insisted on receiving a letter of credit in the full amount of the aluminum it was to supply plaintiff Hallmark ($1,900,000); and (6) the second supplier to which Hallmark turned after declining to buy from Reynolds also insisted on receiving a letter of credit for the full amount of the purchase. After the jury found that one of the manufacturers was not a party to any conspiracy but that defendant Reynolds and the defendant contractor did conspire, the court granted motions for judgment n.o.v., pointing out as to the letter of credit that:

> [Plaintiff] Hallmark had substantial debts, lacked working capital, had never made a profit, and had no unencumbered assets. Reynolds was unwilling to risk not getting paid and, therefore, demanded the letter of credit.

489 F.2d at 11.

The Court of Appeals affirmed, holding there was insufficient evidence to support an inference of conspiracy in view of the overwhelming evidence which rebutted any such inference. As to the matter of the letter of credit (analogous to the personal guarantee in the present case obtained by Burlington in 1965 and the renewal of which was sought in 1966), the Court stated (pp. 13-14):

> With respect to the credit demand, certainly Hallmark's financial position of near insolvency provides a legitimate business motive for the credit requirement.[5] See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke

[5] The persons responsible for the Reynolds credit decision testified that the decision was based upon independent considerations and that they had no contact with Stanray prior to the decision.

> & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970). . . . Even if Reynolds could have supplied the aluminum for Stanray's design, there was no reason to expect that Reynolds' refusal to sell to Hallmark would result in Stanray's obtaining the contract. Several other companies could have supplied Hallmark with its aluminum requirements.
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> Given no contrary evidence, a jury question might be presented as to Reynolds' motives in demanding the letter of credit, wholly apart from the wisdom of that decision. However, there were other non-conspiratorial motives involving the exercise of business judgment as to the attractiveness of the opportunity offered by Hallmark. Therefore, in view of the overwhelming contrary evidence, only one conclusion can be drawn: That Reynolds' security requirements did not result from conspiratorial motives. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S.Ct. 1575, 20 L. Ed.2d 569 (1968).

See also, Independent Iron Works, Inc. v. *United States Steel Corp.*, 177 F.Supp. 743, 746-47 (N.D.Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17, 19-20 (9th Cir. 1971); *Clark* v. *United Bank of Denver, N.A.*, 480 F.2d 235 (10th Cir.), *cert. denied*, 414 U.S. 1004 (1973); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F.2d 289 (2d Cir. 1955); *Pacific Tobacco Corp.* v. *American Tobacco Co.*, 1974 Trade Cas. ¶ 74,991 (D.Ore. 1974); *Eaton, Yale & Towne, Inc.* v. *Sherman Industrial Equip. Co.*, 316 F.Supp. 435 (E.D.Mo. 1970).

Another case on point is *Wall Products Co.* v. *National Gypsum Co.*, 357 F.Supp. 832 (N.D.Cal. 1973), where plaintiffs alleged that they lost their businesses as a result of the withdrawal of credit terms by three defendants during a two-week period. The court rejected plaintiffs' claim of conspiracy, finding that the withdrawal of plaintiffs' credit terms was entirely justified and, further, that it was not the proximate cause of plaintiffs' business failure. The court stated (357 F.Supp. at 845):

> Considering the precarious financial position of plaintiffs by the end of 1965 and the enormous amounts they owed the manufacturers (all past due from as many as 2 months to 8.8 months . . .) it is clear that the defendants would have or should have withdrawn by early 1966 the extended terms previously granted to plaintiffs, even in the absence of any claimed conspiracy. . . .

See also, Di-Wal Inc. v. *Fibreboard Corp.*, 1970 Trade Cas. ¶ 73,155 (N.D.Cal. 1970) (inference of conspiracy disallowed where defendants independently withdrew extended credit terms from customers).

It is perfectly plain that the overwhelming evidence of Textura's drastic financial condition fully rebutted any remotely conceivable inference of conspiracy that could be drawn from Burlington's credit and sales actions, which not only were dissimilar to Clark-Schwebel's conduct, but were fully consistent with Burlington's individual self-interest. That this is so is buttressed by the fact that Burlington took actions in prior years, when no conspiracy was claimed, very similar if not identical to those it took in 1966 (*e.g.*, obtaining a personal guarantee in the non-conspiracy year of 1965).

Thus, plaintiff failed to overcome the overwhelming evidence that Textura had become an unattractive credit risk and that Burlington's actions were based on that fact. Accordingly, the jury should not have been allowed to infer a conspiracy on the basis of Burlington's credit actions in 1966, and the motions for a directed verdict or for judgment notwithstanding the verdict should have been granted.

C. A Case of Conspiracy Was Not Made Out by Resort to the "Other Factors" Relied Upon by Plaintiff and the Court

The district court seemed to sense the inherent fallacy in its reasoning that the above credit and sales actions of Burlington were contrary to its self-interest and could be rationalized only on the basis of a conspiracy with Clark-Schwebel (and perhaps others).[34] Thus, also without dis-

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[34] See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev.

cussion, the court held in its memorandum opinion that plaintiff also "proffered evidence of motive, constant contact and communication between defendants at the time of their similar . . . restrictive conduct, as well as admissions and threats." Absent any elucidation of these "other factors" deemed by the court to support inferences of conspiracy, we can only deduce from certain fragments of the trial record and arguments in plaintiff's post-trial brief exactly what the court may have had in mind. We do stress, however, that the "proof" on these other factors was at best sketchy and in the nature of afterthought, for the overwhelming majority of trial time was devoted to efforts to show that defendants acted in a similar and parallel fashion and that each was conscious of the acts of the other.

The point here is, as we show now, that these insignificant and remote "other factors" cannot serve to convert plainly lawful and innocuous conduct into a conspiracy.

1. *Defendants' "Contacts" and "Communications" Were Lawful Credit Exchanges*

Both plaintiff and the district court (App. 992) agreed that the exchange of credit information is not itself unlawful. See *Cement Manufacturers' Protective Association* v. *United States,* 268 U.S. 588 (1925), *supra*; *Swift & Co.* v. *United States,* 196 U.S. 375 (1905). Nor is there any claim that the credit exchanges in this case as reflected in contemporaneous memoranda, constitute on their face any direct evidence of conspiracy. Paradoxically, and contradictorily, however, the district court relied on these very exchanges as an additional factor ("constant contact and communication" between defendants during the conspiracy period of March to December, 1966) to support the finding of conspiracy.

First, as pointed out above, these were legitimate exchanges of information made in the ordinary course of

655, 658 (1962): "[C]onscious parallelism is not even evidence of agreement unless there are some other facts indicating . . . that the decisions [of the alleged conspirators] were consistent with the individual self-interest of those concerned only if they all decided the same way."

business by Burlington's Credit Department and cannot by any stretch of the imagination provide evidence of an agreement to drive Textura out of business. They consist entirely of telephone calls [35] to Mr. Kelly of Burlington's Credit Department, which is independent of the fiber glass sales department (Hess, Goldsmith Division) (App. 1008).

Moreover, in each and every case the subject matter of the calls involved topics which Textura's own accountant and expert witness, Mr. Zimmerman, testified would be of legitimate interest to any credit man and which he himself would routinely impart to creditors inquiring about the condition of a client (App. 716-17, 753-55).

Far from reflecting any intent or purpose to drive Textura out of business, these exchanges frequently show a conciliatory attitude toward Textura and a desire to continue to work with the account notwithstanding its financial troubles. A summary of each of these exchanges was set out in our memorandum in support of the motions for judgment n.o.v. and plaintiffs never suggested that this summary was inaccurate, incomplete or misleading in any way. Here is the sum and substance of those telephone calls:

i) On June 8, 1966, Ray Nordheim of Clark-Schwebel called Charles Kelly of Burlington and advised him that Clark-Schwebel was having considerable difficulties with Textura and was contemplating taking Textura to arbitration. Mr. Nordheim also advised that Clark-Schwebel was holding Textura to CBD [cash] terms and was refusing new orders. Mr. Nordheim asked Mr. Kelly to keep the information confidential and stated he would keep Mr. Kelly informed (App. 1488, 863).

ii) On June 30, 1966, Mr. Nordheim called Mr. Kelly and advised that Powrie was considering settling the arbitration by agreeing to take delivery of goods over an extended period of time. Mr. Nordheim indicated that he

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[35] There were seven such calls during the entire 10-month period of the alleged conspiracy, which can scarcely be fairly characterized as "constant contact and communication."

would be very cooperative with Textura, would not insist on immediate delivery, and was willing to work out any kind of reasonable delivery schedule. Mr. Nordheim said he would advise Mr. Kelly in the event the arbitration was settled along these lines (App. 1494, 865).

iii) At some time probably between June 30 and July 6, 1966 (date uncertain), Jack Schwebel of Clark-Schwebel spoke with Mr. Kelly on the phone to discuss Burlington's credit experience (App. 663). Mr. Kelly told Mr. Schwebel that Burlington would accept new orders from Textura if Powrie would give his personal guarantee since Burlington was worried that if Clark-Schwebel was successful in arbitration, Textura would be in virtual bankruptcy (App. 1496, 666).

iv) On July 8, 1966, Mr. Nordheim called Mr. Kelly. Nordheim had talked with Mr. Powrie about certain payment terms in settling the arbitration which Powrie said it would be impossible to meet. Mr. Nordheim said that Powrie had mentioned that his credit was being affected by the arbitration. Mr. Nordheim told Kelly that Clark-Schwebel would be receptive to any kind of reasonable proposition by Powrie and said he had suggested that Powrie work out a payment schedule and call him (Nordheim) by July 7, 1966, but that since Nordheim had not yet received any word from Powrie, he was going ahead with the arbitration (App. 1500, 869-70).

v) On July 26, 1966, Mr. Nordheim called Mr. Kelly and advised him that the matter was going to arbitration. Nordheim had told Powrie that Clark-Schwebel was not out to put him out of business, but Nordheim merely wanted him to state how many goods he would take in each month. Clark-Schwebel was unable to get any answer but had recently received a letter from Powrie's attorney. Nordheim said he was very anxious to avoid arbitration but if Textura insisted on going through with arbitration, Clark-Schwebel felt confident that they would win and if so, they would no longer be in the mood to compromise and would insist on immediate payment which might very

well bankrupt Textura (App. 1508, 871-72).

vi) Finally, two communications occurred subsequently which not even plaintiff alleges reflect or are part of a conspiracy. On August 25, 1966, Nordheim called Kelly at *Powrie's request* to confirm that Textura and Clark-Schwebel had reached a settlement of their dispute and to inform Kelly of the payment terms (App. 1537). On September 6, 1966, Nordheim called Kelly to advise him of revised settlement terms reached between Textura and Clark-Schwebel (App. 1522). Nordheim said that Textura was late in making its first payment pursuant to the agreement and that Powrie was trying to scrape together the amount of the first payment.

These communications—which must be deemed reasonable and proper under the rationale of the *Cement* case—could not possibly support any theory of conspiracy. As Textura's own accountant admitted (App. 716-17, 753-55), these communications involved matters concerning a common customer which would be of legitimate interest to any credit man. Mr. Powrie himself recognized the legitimate nature of these communications as evidenced by his own request that Clark-Schwebel inform Burlington that they had reached a settlement of their dispute (App. 1537), and by his own testimony at trial that a dispute of that size would naturally be of concern to Burlington and Textura's other creditors (App. 524-26).

When Burlington received these communications, it did no more than take notice of Clark-Schwebel's dispute with Textura—a dispute which, if resolved in Clark-Schwebel's favor, would very likely result in serious impairment of Textura's ability to pay its outstanding and future debts to Burlington (App. 1496, 666). Even if plaintiff's tenuous argument is accepted that these calls were an invitation to Burlington to participate in a scheme to drive Textura out of business (and on their face they are inconsistent with any such notion), there is no claim that Burlington ever verbally expressed any acceptance of such an offer.

Burlington's "consciousness of commitment to a common scheme"—vital to a showing of conspiracy (*e.g., United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963))—had to be shown, as plaintiff repeatedly admitted, by what Burlington *did*—by its conduct. As shown above, what Burlington *did* was utterly at odds with any participation in a scheme to drive Textura out of business. In short, whatever Clark-Schwebel's unexpressed motives may have been, Burlington continued at all times to act in its independent self-interest, continued to follow a credit policy with respect to Textura formulated and implemented long before the alleged conspiracy is said to have begun, continued to be willing to sell to Textura, and did in fact continue to sell to Textura *on credit* throughout that company's existence.

2. *Burlington Had No "Motive" to Drive Textura Out of Business*

The finding that Burlington had a "motive" to get rid of its customer, Textura, is strictly makeweight. Plaintiff totally failed to show by anything other than speculation that Burlington stood to gain in any way by conspiring with Clark-Schwebel.

The record clearly demonstrates that throughout the period of the alleged conspiracy each of the defendants was owed substantial amounts by Textura, which would be lost—and which were in fact lost—if Textura went out of business. Moreover, if Textura went out of business defendants would lose—and did in fact lose—a customer for additional merchandise. The record demonstrates that Burlington, at least, was interested in and was trying to make further sales to Textura *even as late as November 1966*, just a few weeks before Textura filed bankruptcy proceedings (App. 1895, 1809). These facts entirely contradict any notion that Burlington had a financial motive to conspire against Textura.

Plaintiff attempted to overcome this clear lack of financial motive for Burlington to conspire by speculating that this appellant wanted to destroy Textura because of com-

plaints it had received (principally by Mr. Vollers) during a *four-year period* from competitors of Textura, including Qual-Fab and Rosco (App. 969-70).[36]

We make three points in response to these assertions: (1) There is nothing unusual for a manufacturer to receive complaints from its customers about their competitors' practices; (2) Burlington never took any action on these complaints and never told Textura to change its practices; and (3) at all times after receiving these complaints, Burlington in fact continued to sell to Textura on open terms of credit.

That sinister implications cannot be drawn from such complaints alone has been recognized consistently by the courts. As stated by Judge Tyler in *Carbon Steel Products Corp.* v. *Alan Wood Steel Co.*, 289 F.Supp. 585, 588 (S.D.N.Y. 1968), "a combination violative of Section 1 of the Sherman Act cannot be implied from the fact that some of [a supplier's] customers complained of [another customer's] practices", for "it was the normal working of the marketplace for them to have done so." Also, in *Plastic Packaging Materials, Inc.* v. *Dow Chemical Co.*, 327 F.Supp. 213, 228 (E.D.Pa. 1971), Chief Judge John W. Lord, Jr., stated:

> [C]omplaints by distributors about competing distributors are normal in the course of business, and are

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[36] Significantly, when trying to project future lost profits in connection with the damage phase of the case (see *infra*), plaintiff tried to justify its failure to use market data for the decorative fiber glass industry (it used instead "Drapery Hardware, Blinds and Shades" as a "proxy" market) on the basis that Textura was unique and that firms engaged in the sale of decorative fiber glass fabrics like Qual-Fab and Rosco were not competitors of Textura. In any event, these so-called complaints related principally to the fact that Textura bought fabrics in the unfinished (or greige) state, finished the goods, and then sold them (App. 891-92). But neither Mr. Vollers of the sales department specifically, nor Burlington generally had any objection to this practice (App. 966). There was never a substantial volume of these complaints (App. 969-70), and they did not rapidly increase in the year 1966 (App. 893-94). Clark-Schwebel received no such complaints whatever.

> by themselves not sufficient to imply a conspiracy. The spector [sic] of a conspiracy arises when the manufacturer contacts the distributor complained of and "advises" him regarding his course of conduct. The manufacturer must go beyond the mere announcement of a policy and supplement it by some means designed to enforce the policy.[37]

The principle was recently reaffirmed by this Court in *Modern Home Institute, Inc.* v. *Hartford Accident and Indem. Co.*, 513 F.2d 102 (2d Cir. 1975), *aff'g Romac Resources, Inc.* v. *Hartford Accident and Indem. Co.*, 378 F.Supp. 543 (D.Conn. 1974). There, the Court stated (per Mansfield, J.) (513 F.2d at 112):

> A company's concern over the possible alienation of its agents is a legitimate basis for independent protective action on its part, which cannot be viewed as conspiratorial in the absence of some evidence of tacit understanding with competitors. Mere pressure by the agents themselves would not provide a basis for such an inference.

The present case is *a fortiori*, for it is uncontradicted that Burlington in fact never took any action against Textura—independent or otherwise—as a result of any complaints (App. 904-05). Mr. Vollers discussed the complaints with Mr. Colton, who told him to "do something" about them (App. 894), which Mr. Vollers understood to mean "pacification, calm down the troubled party, and in most cases this is all that is required" (App. 970-71).[38] Mr. Vollers "discussed them with the account that had made them

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[37] In *Plastic Packaging*, the Court found that the defendant supplier had ample reason to refuse to deal with plaintiff (which Burlington never did in the present case), because, *inter alia*, (1) plantiff had made substantial quality claims against the supplier and had fallen in arrears in payment on its account; (2) plaintiff failed to provide up-to-date financial data and had an apparent low net worth; and (3) plaintiff had raised and dealt with routine problems in a manner which caused its business relationship with defendant to become strained, and which caused defendant to exert undue effort and attention to plaintiff's account.

[38] During summation, plaintiff's counsel flatly misrepresented the testimony of Mr. Vollers by stating that this witness said that Mr.

and resolved them on the basis of a logical explanation of the conduct of our business" (App. 904). Mr. Colton *never* suggested stopping doing business with Textura (App. 971), and Burlington "took no action with respect to Textura as far as those complaints were concerned" (App. 904-05). Moreover, Mr. Vollers never discussed these complaints with anyone outside of Burlington (App. 969) and there is no evidence that anyone in Burlington's sales department ever suggested to anyone in Burlington's Credit Department or anyone at Clark-Schwebel or Stevens that Textura's credit arrangement should be modified or restricted. (*See* App. 902-04).

Most persuasive is the fact that Burlington continued to sell to Textura on credit for *four years* after receiving these complaints (or "gripes" as Mr. Vollers called them (App. 970)). Burlington's acceptance of a new Crown contract (App. 1537), its weaving of Homespun, its running a sample weave of Morro, its continued willingness to extend credit on new contracts and to continue to weave fabrics for Textura (App. 1537, 1895, 1809) entirely contradict plaintiff's theory of motive.

In *Scott Medical Supply Co.* v. *Bedsole Surgical Supplies, Inc.*, 488 F.2d 934 (5th Cir. 1974), plaintiff-dealer alleged a vertical conspiracy to cut him off between a manufacturer and another dealer. While plaintiff showed that the manufacturer had received complaints about him *a year before* his dealership was terminated, the Court of Appeals for the Fifth Circuit reversed the judgment on a

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Colton told him: "Do something about Textura" (App. 1119). Mr. Vollers said no such thing. Also, counsel for plaintiff on summation said that Mr. Vollers "received so many [complaints] he couldn't keep them in his head" (App. 1119). There was no such testimony. The fact is that Mr. Vollers testified there was never a substantial volume of complaints (App. 969-70). Nor was there the faintest conflict in Mr. Vollers' testimony remotely supporting counsel's reckless and inflammatory charge before the jury that this witness was lying (App. 1119).

jury verdict entered for plaintiff. Finding that the manufacturer continued to supply plaintiff for over a year after receiving the complaints, the Court stated, "[i]t is, of course, axiomatic that inferences [of a conspiracy] which Scott would have us draw, cannot stand in the face of uncontradicted and substantial evidence to the contrary." 488 F.2d at 937. Whereas in Scott, the manufacturer continued to sell to plaintiff for over a year after receiving complaints and then terminated, in the present case Burlington continued selling on extended terms for *four years* and *never cut Textura off*. *A fortiori,* in the present case, "inferences of a conspiracy which [Textura] would have us draw, cannot stand in the face of [this] uncontradicted and substantial evidence [showing the complaints were meaningless]".

The undisputed, written, contemporaneous record (*e.g.*, (App. 1891, 1537, 1526, 1895) reflects a desire on the part of Burlington—actually carried out—to continue to sell to Textura and to extend it credit even running into 1967! As in the *Scott* case, any conceivable inference from these "complaints" was totally and overwhelmingly rebutted by direct evidence and judgment must be entered for defendants.

3. *Burlington Made No "Threats" or "Admissions" Showing Any Participation in a Conspiracy*

The court did not specify what it deemed to be any "threat" or "admission" made by Burlington and we can only guess at what the court had in mind. One statement the court may have had reference to occurred in a conversation between Mr. Powrie of Textura and Mr. Nordheim of Clark-Schwebel on or about June 1, 1966 (App. 395). No one from Burlington was present and there is no evidence anyone at Burlington ever was even told of the communication. The colloquy was described by Mr. Powrie:

> . . . I told him [Nordheim] that if arbitration was similar to being sued for the amount of money he was

> talking about, which was a whole lot of money for our firm, that it would have a poor effect on our credit, and I said to him, "Ray, you know what effect this will have on our suppliers" . . . He said, "Yes, I know the effect, and we will crucify you."

It is clear, *first,* that as to Burlington, this statement is rank hearsay and cannot support an inference of conspiracy unless and until Burlington's participation in the alleged conspiracy is established by extrinsic, independent evidence. *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942); *Standard Oil Co.* v. *Moore,* 251 F.2d 188, 210 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958). *Second,* it was Mr. Powrie who "*concluded*" that by the term "we" Mr. Nordheim was referring to Burlington and Stevens as well as to Clark-Schwebel. In fact Mr. Nordheim never indicated by this or any other statement that he was referring to any party other than Clark-Schwebel, and Mr. Powrie's "conclusion" is not substantial evidence. For both these reasons the jury should not have been allowed to consider this statement in inferring the existence of a conspiracy. *Standard Oil Co.* v. *Moore, supra,* at 210.

Another statement, again testified to solely by Mr. Powrie, was made by Mr. Colton of Burlington sometime during 1964—nearly two years prior to the commencement of the "conspiracy". According to Mr. Powrie, it was stated that if he, Colton, could find a way, Burlington would rather not do business with Textura.[39] As in the *Scott* case, *supra,* it is settled that such a statement occurring *two years prior to the beginning of the alleged conspiracy,* can provide no basis for ascribing conspiratorial implications to much later actions, particularly since it is

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[39] This statement allegedly was made in 1964 at a time when Textura (1) had refused to give Burlington a personal guarantee (App. 1027-29, 1826); (2) owed Burlington as much as $90,000 (App. 1578); (3) had *deficit* working capital on the order of $50,000 (as of August 31) (App. 1725); (4) had interim net losses of $76,936 in June (*id.*); and (5) ended the year with a net loss of $113,788 (App. 1343). Moreover, the way to stop doing business with Textura was to stop doing business with Textura. Burlington, as often repeated herein, never did stop doing business with Textura.

undisputed that Burlington *did* continue to do business with Textura at all times. The passage of a two-year period from the time the statement was made clearly vitiates whatever threatening portent, if any, it may have once had.

The only other conceivable "threat" to Textura was a statement (again testified to solely by Mr. Powrie) by Mr. Schutz of Burlington "to the effect" that unless Textura settled its arbitration dispute with Clark-Schwebel, Burlington probably could not continue Textura on an open line of credit (App. 434). While Powrie may have *perceived* Mr. Schutz to be threatening him, the record establishes that Mr. Powrie could not remember what, in fact, it was that Mr. Schutz said, nor how it was said, nor when it was said, nor who was present at the time it was said (App. 431-34).[40]

Moreover, even assuming Mr. Schutz made this statement, he could only have been expressing a concern from a credit man's viewpoint about a pending arbitration which, if lost by Textura, could have impaired its ability to pay its bills to Burlington. This was a concern that Textura's own accountant, Mr. Zimmerman (App. 753-55), recognized was reasonable and to be expected, and which Mr. Powrie himself was concerned about since he knew it would naturally affect Textura's credit standing with his other suppliers because they would worry about Textura's ability to pay its indebtedness to them (App. 525).

Finally, plaintiff argued that Mr. Nordheim of Clark-Schwebel admitted on the stand that he was engaged in an effort to destroy Textura and was trying to get Burlington to go along when he testified as follows (App. 867-68):

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[40] In point of fact, this could not have been a "threat" coercing Textura to settle with Clark-Schwebel because, as Mr. Powrie testified, he had *already* decided to settle the arbitration *before* he met with Mr. Schutz; he said he had come to New York for that purpose, and merely dropped by without an appointment to visit with Burlington credit personnel, including Mr. Schutz (App. 431).

Q. So, it's true that you did call Mr. Kelly on this account more frequently at the time you were instituting arbitration?

A. When you're in trouble what do you do? You protect yourself.

Q. I am asking you a question—yes or no?

A. I can't answer it yes or not.

Q. You say when you are in trouble you protect yourself? Thank you. And protecting yourself was making telephone calls to Mr. Kelly? That was one way of protecting yourself?

A. No.

Plaintiff's counsel during summation told the jury that this "statement alone is clear evidence that Nordheim's purpose in making these calls was to get his buddies, his co-conspirators, the co-defendant Burlington, to take action against Textura's account. By protecting himself he meant he could get help from his friends" (App. 1147). This is simply putting words in Mr. Nordheim's mouth, for he said no such thing. Plaintiff is entitled to fair inferences but not to such flights of fancy.

In any event, whatever the meaning of this ambiguous bit of testimony, Mr. Nordheim never communicated any such purpose to Burlington, whose participation in a conspiracy cannot be supported by real or imagined ideas in the back of Mr. Nordheim's mind.[41] "The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme" (*United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963)).

Burlington's undisputed words, acts and practices establish beyond a doubt that it never made such a commitment

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[41] Even the district court recognized this point (at least before the distracting "personal emergency" required his departure) when he stated to plaintiff's counsel on argument on defendants' motion for directed verdicts (App. 994-95):

> Supposing Clark-Schwebel had all these motives and intentions that you talk about; you would also have to show [the] other parties were privy to these motives and intentions and going along willingly with Clark-Schwebel . . . [Y]ou can paint a very black picture, although I don't say that, but that doesn't lead you into a conspiracy on the part of the other two defendants here.

and never participated in any conspiracy to drive Textura out of business.

II. There Was Insufficient Evidence From Which The Jury Could Find That Defendants' Actions Caused Textura To Go Out Of Business

We argued below on post-trial motions that Textura—historically bordering on bankruptcy and having, for reasons unrelated to defendants' conduct, lost its principal source of cash, Dommerich—had not shown that defendants' actions had driven it out of business. The district court's sole response to this (and to our related argument as to the *amount* of damages) was as follows (Memorandum, p. 3, App. 279):

> . . . [T]here was sufficient evidence from which the jury could have reasonably found that defendants' conspiracy was the proximate cause of Textura's damage and to support the jury's award.

To the contrary, no probative evidence whatever was adduced either as to the fact of injury or the amount of plaintiff's damages.[42]

Plaintiff presented three theories as to why Textura went out of business. *First,* Powrie testified that Textura was not able to generate cash after July 1966, because it could not get any fabrics from Clark-Schwebel, Stevens or Burlington (App. 576). *Second,* Powrie testified that

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[42] While the *amount* of damages may be shown by reasonable approximation in an antitrust case, the "fact of injury" must be established with some certainty. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-63 (1931). As stated by Judge Friendly, the plaintiff has the burden in an antitrust case to "establish a clear causal connection between the violation alleged and the injuries allegedly suffered". Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1004 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *accord*, Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); Wolfe v. National Lead Co., 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955). *See also* Ovitron Corp. v. General Motors Corp., 512 F.2d 442 (2d Cir. 1975) (*per curiam*).

after July 1966, Clark-Schwebel, Burlington and Stevens "shut down extended credit terms" so that Textura had to pay its bills within a shorter period of time, thereby causing a cash flow problem (App. 576). *Third,* Powrie testified that Dommerich's actions in July and August, 1966, deprived Textura of the cash it needed to operate (App. 466-67, 577).

Before turning to a more detailed discussion of these theories we note preliminarily on the matter of the alleged unavailability of fabrics that Burlington during this post-July period had large inventories of fabrics for Textura (except there was no Crown in August and part of September) which Textura simply never called out.[43] See *Cleary* v. *National Distillers and Chemical Corp.*, 1974 Trade Cas. ¶ 75,330 (9th Cir. 1974) (before a refusal to deal is actionable under the antitrust laws it must appear that plaintiffs in fact made an offer to purchase). Moreover, Textura itself during this period, as shown by its own records, had large and growing inventories of fabrics. At the end of July, 1966, Textura had fabric inventories in the amount of $171,848 (App. 1377); its fabric inventories were $175,808 at the end of August (App. 1380), $184,945 at the end of September (App. 1383), and $186,650 at the end of October, 1966 (App. 1384). Indeed, Powrie testified that there was a net addition to inventories in October 1966 of $38,000, and that at this time he was receiving credit from *both* J. P. Stevens and Burlington (App. 1063).

The acquittal of J. P. Stevens is very significant to the issue of causation. Textura never had quality problems with Stevens and Stevens did not restrict Textura's credit.[44] That Stevens was able to supply a large portion of Tex-

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[43] Textura at this time was concerned that it would be required to call out some or all of the Clark-Schwebel fabrics involved in the arbitration dispute and doubtless wanted that matter resolved before making further fabric commitment (*See* App. 1893.)

[44] Powrie testified that credit ceilings imposed by Stevens were never observed (App. 517-18) and on occasion Textura ran up credit balances with Stevens as high as $60,000 (App. 518).

tura's fabric requirements cannot be disputed in the face of plaintiff's own evidence that Stevens in 1965 sold Textura a total of $126,000 worth of fabrics (Burlington's sales to Textura that year were $159,000), $145,642 in 1963, and $210,020 in 1959 (App. 1791). The record is silent as to why Textura bought only about $58,000 worth of fabrics from this nonconspirator in 1966 (*id.*). In short, Stevens did not participate in any conspiracy to withhold fabrics from Textura or in any way to drive it out of business and by definition Stevens remained at all times a viable, independent source of fabrics for Textura. Since plaintiff thus failed to show that it could not obtain fabrics from this and other alternative sources, the contention that the unavailability of fabrics from Clark-Schwebel and Burlington caused Textura's collapse must fail, and the lower court's decision must be set aside. *See Elder-Beerman Stores Corp.* v. *Federated Dep't Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972).

Finally, to the extent Textura's troubles were caused by the unavailability of cash with which to pay its bills, it appears that the prime contributing factor, as plaintiff itself contended, was termination of its factoring agreement by L. F. Dommerich, Inc.—Textura's "banker"—and the attendant withholding of money by Dommerich in the form of a cash reserve. While Dommerich was named a coconspirator, there clearly was no evidence that it participated in any conspiracy, and the district court so ruled (App. 916-18).

A. There Was No Evidence That the Unavailability of Burlington and Clark-Schwebel Fabrics Caused Textura to Fail

Plaintiff introduced evidence of three kinds to support its claim that the unavailability of fabrics from these two defendants caused Textura's demise: (1) undated and unfilled invoices to Textura's customers which Textura allegedly could have filled if it had had fabrics (App. 481);[45] (2) contracts which remained uncompleted at the time Tex-

[45] These invoices (App. 1652, 1653) were received into evidence

tura went out of business (App. 482);[46] and (3) job status reports of Textura's sales offices.[47] As for the unfilled invoices, their total dollar amount was only $12,400. Furthermore, Burlington and Clark-Schwebel fabrics accounted for less than one-half of this total figure (about $5,000). It simply is inconceivable that the loss of $5,000 of sales could substantially have injured Textura or contributed to its going out of business, notwithstanding the financial thinness of the company.

Similar considerations apply to the uncompleted contracts. In the first place, with but two exceptions (the Del Webb and Carter contracts (App. 1706, 1568)), installation on these "uncompleted" jobs was not even scheduled to begin until 1967 and the contracts were offered in evidence solely to show what profits Textura would have made in 1967 if it had remained in business (App. 483, 484-98). These contracts thus bear absolutely no relevance to the issue of why Textura went out of business in 1966 before work on the contracts even started.[48]

In any event, no Burlington fabrics were specified in any of these contracts.[49] A Clark-Schwebel fabric was specified in one of the contracts, but Powrie testified that in fact this job was completed after 1966 with a Clark-Schwebel fabric (App. 488-89). The "uncompleted" contracts, therefore,

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subject to connection (App. 481). It appears from the record that plaintiff was required to produce the corresponding purchase orders, which it failed to do.

[46] App. 1564, 1566, 1568, 1699, 1704, 1706.

[47] App. 1570, 1707-1711.

[48] While Textura had started installation on the Del Webb and Carter projects in 1966 on a work-progress basis and the contracts were not fully completed by the time Textura went out of business, neither of these contracts specified Burlington or Clark-Schwebel fabrics and there was not a shred of evidence that these contracts remained unfinished as a result of the unavailability of fabrics.

[49] Plaintiff at one point apparently included within this category of uncompleted contracts a job involving the fabric Crown (App. 1558), but Powrie testified that "that job was done by Textura while we were still in existence" (App. 499-501).

provide no support for any claim that Textura was driven out of business due to the unavailability of fabrics.

Finally, plaintiff relied on so-called status reports from its various sales offices to show jobs for which fabrics allegedly could not be obtained. These reports—prepared between June and September, 1966—purported to keep the "home office" apprised of new contracts and of jobs that were being worked up for bids or were believed close to being awarded to Textura (App. 506). These reports are of little or no probative value. There is no evidence as to whether any of these potential contracts ever materialized or if so whether they in fact were completed. Moreover, the reports show that in fact there were no contracts *to be completed in 1966* specifying fabrics manufactured by Clark-Schwebel. Only $26,100 worth of contracts in the job surveys specified Burlington fabrics. Thus, even assuming that none of the contracts were completed prior to December 13, 1966, lost sales in the amount of $26,100 as a result of the alleged unavailability of fabrics by Clark-Schwebel and Burlington is *de minimis*.[50]

B. The Elimination of Extended Credit Terms After July, 1966 Did Not Cause Textura's Failure

Plaintiff's second theory of causation is that *after July* 1966, Textura paid out more money and at a faster rate because of the elimination of extended credit terms by Clark-Schwebel, Burlington and Stevens.[51] There is a total failure of proof on this point.

First, only Clark-Schwebel put Textura on a cash basis and modified the practice by which goods were held for

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[50] The reasonable inference is that some if not all of these contracts were completed. The contracts included $18,000 worth of Satin Boucle and $8,000 worth of Crown. But Textura not only had large inventories of fabrics at hand during this period, it also received substantial shipments of both Crown and Satin Boucle during the period July through November, 1966 (App. 1645), certainly enough to have finished these contracts.

[51] This theory, too, is undercut at least in part by Stevens' acquittal.

Textura in the mill's inventory until called out by Textura. This means that Textura was able to purchase goods on credit throughout 1966 from Burlington and J. P. Stevens, the two largest suppliers (App. 556, 1063).

Moreover, the record shows that the actual payments made by Textura to Clark-Schwebel, Burlington and Stevens during the months January through July, 1966 totaled $294,987, which is an average of $42,284 per month (App. 1928, 1578, 1777). By contrast, Textura's payments to these three suppliers totaled only $48,685 over the balance of the year (July to December) which is an average of just $9,737 per month.

Nor is there evidence to support plaintiff's theory that an elimination of extended credit terms caused defendants (or other suppliers) to stop delivering goods to Textura. First, as already noted above, the evidence established that the value of Textura's inventory continued to increase each month after June, 1966, which means that more fabrics were delivered each month to Textura by its suppliers than Textura was able to sell. Second, Powrie testified that there was only one occasion when Burlington did not deliver fabrics requested by Textura because Textura was not current on 60-day terms. This one instance involved only $1,200 worth of goods (App. 479-480). In the face of this evidence, it cannot be held that plaintiff sustained its burden of showing a clear causal connection between the acts of defendants and the business collapse of Textura.

C. The Principal Cause of Textura's Failure Was the Termination By Dommerich

There were two significant related actions taken by Dommerich which had an immediate and adverse impact on Textura in about July of 1966. First, Dommerich built up large cash reserves in Textura's account during the months of July and August, 1966. Second, Dommerich in fact terminated the factoring agreement with Textura on August 19, 1966. These actions deprived Textura of the cash it needed to operate.

Powrie conceded that Textura was a "financially thin operation", "never had a surplus of cash" (App. 514-15),

and had to have financing from its factor in order to continue in business. On the latter point, Powrie testified that a factor "creates a cash flow that a business doesn't otherwise have" (App. 458).

With respect to Dommerich building up its reserves in July and August, 1966, Powrie testified as follows (App. 466-67):

> Q. What effect did L. F. Dommerich's reserve of $84,000 in July and August have on Textura's ability to do business?
>
> A. The effect was that we didn't have cash to operate with.

Further, Powrie told Burlington's Credit Department on September 22, 1966, that he thought he could save Textura *if* he could (1) work out a better payment arrangement of the arbitration settlement with Clark-Schwebel, *and* (2) obtain another factor to replace Dommerich (App. 1526). Mr. Knisel of Stevens' credit department corroborated Powrie's assessment, testifying that Textura had to resolve two problems if it was to remain in business, "[o]ne was the arbitration with Clark-Schwebel, which he [Powrie] was seeking to put on a workable basis, and the other was a lack of a financing house" (App. 909).

At a meeting with Powrie on September 28, 1966, Clark-Schwebel agreed, at Powrie's request, to reduce Textura's payments of $10,000 every two weeks to only $5,000 *a month* for 13 months. However, after talking to six or seven factoring houses, Powrie was not successful in obtaining a factor to replace Dommerich (App. 465).

The significance of Textura's failure to obtain a new factor was summed up by Mr. Janetschek of the credit department of the acquitted J. P. Stevens (App. 913-14) (emphasis added):

> Q. Was it a matter of concern to you that Dommerich was cancelling its account, its factoring account?
>
> A. Well, it would be a matter of concern for us if they did cancel the account, certainly.
>
> Q. What was the basis for that concern?
>
> A. Well, if the account was left without a factor, they would not have anyone to check their credit for

> them, they wouldn't have the availability of the cash flow that was available to them in the past. *They could not operate without a factor.*

The issues of causation in the present case are directly analogous to those presented in *Wall Products Co.* v. *National Gypsum Co.* 357 F.Supp. 832 (N.D.Cal. 1973). In that case, plaintiffs, who were admittedly poorly financed, alleged that defendants, as part of a price fixing conspiracy, agreed to "withdraw extended credit terms" as a result of which plaintiffs were put out of business (*id.* at 834-35). The Court had previously determined in a separate trial that defendants had entered into the conspiracy as alleged.

At the conclusion of a separate trial on causation and damages, Judge Zirpoli ruled that plaintiffs had been injured as a result of defendants' conspiracy to fix prices, but that plaintiffs failed to prove that their going out of business had been proximately caused by defendants' agreement to withdraw extended credit terms.[52] The Court held that other factors were the proximate cause of plaintiffs' business failure, including "their lack of working capital; their mismanagement and inability to operate at a profit; . . . their hopeless financial condition . . . and a decline in [plaintiffs' industry] in 1965 and 1966" (357 F.Supp. at 844). Similar factors are reflected by Textura's financial history, including (1) a chronic lack of working capital (App. 514-15); (2) a record of financial losses (App. 513); (3) a state of insolvency coupled with another substantial year-end loss just prior to the alleged conspiracy (App. 1029-30, 1343, 1350); and (4) loss of its factor, without which it could not operate. *See Hanson* v. *Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974), where a jury verdict was reversed by the Court of Appeals on the grounds that plaintiff's business failed not because of antitrust law violations, but due to lack of profitability over the years, refusal to pay debts and increasing liabilities.

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[52] There was no claim that the price fixing itself drove Wall Products and the other plaintiffs out of business.

Simply stated, Textura had two problems it had to solve in the fall of 1966 in order to avoid a business failure. It solved one of those problems when Clark-Schwebel reduced Textura's payments in modification of the arbitration settlement. On the other hand, Textura was not able to obtain another factor to provide the necessary cash for its continued operation. This is what caused Textura to go out of business but, as the court below ruled, loss of its factoring arrangement with Dommerich was a matter not shown to be part of the conspiracy alleged.

III. The Award Of Damages To Textura Is Based On Pure Speculation

Plaintiff's claim for damages in this case involved lost future profits resulting from the destruction of Textura's business. Except for a related claim for damages during the period of the conspiracy while Textura remained in business, no other theory of damages was advanced or involved in plaintiff's proof and no other theory was submitted to the jury (App. 1210).

The cases uniformly hold that in seeking recovery for lost *future* profits arising from destruction of a business, plaintiff *must* present evidence to show either (1) how comparable competitors or the market in which plaintiff had been engaged fared during the period following the destruction; or (2) how the destroyed business performed during a representative period before imposition of the illegal restraints. In the absence of either of these analyses, there simply is no basis for concluding that the destroyed business would have received any specific, quantifiable amount of profits during the period of the projection.

As to the first method of proof, plaintiff in the present case offered no proof at all as to how any other firm, comparable or otherwise, performed during the post-1966 period.[53] The only evidence as to market performance con-

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[53] Plaintiff's marketing expert Dr. Bruner, said that Textura was unique since it use a "heat-shading coefficient" in selling fabrics (App. 820). The record shows, however, that other firms sold direct in the contract field and at least one—Thortel—was

sisted of the testimony of Dr. Bruner, who analyzed not the market Textura was engaged in (the fiber glass drapery industry) but a so-called "indicator" or "proxy" market ("Drapery Hardware and Blinds and Shades"). This "analysis" resulted in a projection of profits for Textura as large as $50,000,000 by 1976. In the absence of any evidence as to probable market behavior following the failure of Textura, the issue of lost future profits should not have been submitted to the jury. The verdict must be set aside whether it is assumed to rest on the invalid and inflated projections of Dr. Bruner[54] or upon the jury's own projections based on Textura's financial statements.

As to the latter approach, plaintiff ignored the representative two-year period preceding the alleged conspiracy when Textura, on the basis of certified and audited financial statements, *lost* about $150,000, and relied solely upon an unaudited, handwritten, internally prepared financial statement for the first six months of 1966 showing a profit of about $50,000. The jury was asked to double this figure and project it ten years into the future, yielding lost future profits of about $1,000,000 (*see* App. 1176, where plaintiff's counsel on this basis asked the jury to project sales of $1,600,000 and upwards per year).

Plaintiff failed to support by competent evidence either what Judge Tenney termed the "big . . . bite" (App. 997) taken by the experts or the smaller bite based on the incompetent, internal Textura document. On either score, the award of damages can be based only upon impermissible speculation.

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using the heat-shade coefficient device after 1966 (App. 977-979).

[54] Plaintiff's other expert witness—the accountant Dr. Mosich—made purely arithmetical calculations based on Dr. Bruner's sales forecasts. In reaching his profit projections ranging between $13,000,000 and $57,000,000 (App. 1772), Dr. Mosich relied entirely upon the accuracy of Dr. Bruner's projections (see App. 835). Accordingly, if the Bruner projections were improper, the calculations of Dr. Mosich likewise would be erroneous.

A. Dr. Bruner's Analysis of the "Drapery Hardware and Blinds and Shades" Industry Does Not Support A Projection of Lost Future Profits by Textura

The "Drapery Hardware and Blinds and Shades" business (Census SIC 2591) enjoyed a remarkable growth during the period 1966 to 1972 (sales increased from $229,000,000 to $363,000,000) (App. 1754). During approximately the same time period, the decorative fiber glass fabrics business was suffering a substantial decline (about 50%) (App. 1930). It was the "Drapery Hardware and Blinds and Shades" industry that Dr. Bruner analyzed in projecting future profits for Textura, which, all agree, was engaged in the fiber glass drapery business.[55]

Dr. Bruner, conceding that Textura did not operate in the drapery hardware, etc. market (App. 797), nevertheless projected increased future sales for Textura on the basis of increasing sales in "Drapery Hardware and Blinds and Shades." This was done on the following model: (1) Dr. Bruner noted that each year during the period 1962-1966, Textura's sales had constituted a certain percentage (between 6-9%) of the sales of drapery hardware, etc. in the state of California (this percentage was relatively stable—a not-surprising fact since drapery hardware, etc. sales in California remained about level during this time period and Textura's sales were quite small in relation to total sales of "Drapery Hardware and Blinds and Shades" (App. 1754)); (2) Dr. Bruner assumed that national sales of drapery hardware, etc., which had enjoyed a dramatic increase in the period 1966-1972, would continue to increase at the same rate until 1976; (3) he assumed further that Textura's national sales of fiber glass draperies would bear about the same ratio to

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[55] During summation, plaintiff's counsel described the market in Bruner's analysis as relating to the "drapery *and* hardware" business, trying to imply to the jury that the study included the sale of draperies (App. 1172). It plainly did not. The census category at issue involved only the hardware items used in drapery installation.

national sales of drapery hardware, etc. as in the California market; (4) Dr. Bruner, therefore, calculated Textura's assumed national sales during the period 1966-1976 simply by multiplying the percentage shares found in (1) above times total industry sales of "Drapery Hardware and Blinds and Shades" as found in (2) and (3) above. This exercise resulted in a projection by Dr. Bruner of sales of fiber glass fabric draperies in the year 1976 of $33,305,000 by Textura, a company whose sales had never exceeded $1,500,000 a year in its 13 year history (App. 1811).

We submit that at least two fatal flaws in Dr. Bruner's use of this "proxy" market analysis render it totally incompetent and unavailable for consideration in projecting Textura's lost future profits.[56] First, there was not a scintilla of evidence showing any correlation between the "Drapery Hardware and Blinds and Shades" industry and the decorative fiber glass industry in which Textura operated. Dr. Bruner testified that when he prepared his report he was aware that the Bureau of Census tabulated annual sales of decorative fiber glass fabrics (App. 798), but he said he did not use these data (which reflected a 50% *decrease* in total industry sales of "Glass Fiber Fabrics (Household)" during the period 1966-1974 (App. 798, 1850-66)) because they dealt with fabrics for the "housing sector" whereas Textura was selling "to a commercial-business-type sector" (App. 825-26).[57] Bruner did admit, however, that if decorative fiber glass fabric sales decreased 50% as indicated by the Census data during the period of time after Textura ceased doing business, that is a factor which "would have to be considered, yes" (App. 799)

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[56] A third defect in the expert's analysis is the totally unsupported assumption that Textura—traditionally a California business (with limited assets)—was on the verge of achieving substantial penetration of the *national* market.

[57] This is a fallacious distinction because large amounts of Textura's fabrics admittedly were sold to apartment buildings, which, of course, are a part of the "housing sector."

in projecting Textura's future sales. Dr. Bruner did *not* consider that factor, however, and conceded that sales of drapery hardware, etc. "could have gone way up" while sales of decorative fiber glass fabrics "could have gone straight down" (App. 807).[58]

More importantly, Dr. Bruner made no effort to establish a correlation between the "unique" fiber glass fabric business of Textura and the "Drapery Hardware and Blinds and Shades" market. For example, Dr. Bruner did not try to show that during the period before its failure, Textura's sales went up or down as sales of drapery hardware, etc. went up or down, or that there was *any* such relationship between Textura's sales and drapery hardware, etc. so as to make the latter a fair future predictor for the former. Indeed, Dr. Bruner's own "evidence" flatly refutes the existence of any such correlation or relationship. For example, the following table (based on App. 1330, 1336, 1343, 1350, 1754, 1811) shows the respective percentage increases or decreases over the prior year in Textura's sales and in sales of drapery hardware, etc. during the period 1962-1966:

Percentage Increase/Decrease
In Sales Over Prior Year

	Drapery Hardware, Etc.		Textura	
	Sales ($)	% Change	Sales ($)	% Change
1962	211,200,000		889,167	
1963	199,600,000	−5.5%	1,108,687	+24.7%
1964	215,600,000	+8.0%	1,061,693	− 4.2%
1965	226,800,000	+5.2%	1,412,986	+33.1%
1966	229,000,000	+1.0%	1,208,092	−14.5%

Thus, in only one year (1965) did Textura's sales and sales of drapery hardware, etc. go up or down together,

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[58] Significantly, the "indicator" market selected by Dr. Bruner contained sales of venetian blinds and shades, admitted *substitutes* for fiber glass draperies. The rapid growth of the blinds and shades business after 1966 may well account for the sharp decline of decorative fiber glass fabric sales during that same time period. Moreover, the "indicator" market used by Dr. Bruner apparently included *all* sales of hardware and blinds and shades (including those for the "housing sector") and not just those in the "commercial-business-type" sector.

and in that year Textura's sales went up over 33% over the previous year while the sales of drapery hardware, etc. went up only 5.2%.

The courts have consistently rejected the use of such proxy or indicator markets where no correlation is shown to exist between the predictor market and the plaintiff's business. In *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970), plaintiff allegedly was driven out of the business of manufacturing and selling wooden food skewers as a result of defendant's antitrust violations. In attempting to prove lost future profits, plaintiff's expert witness projected future sales on the basis of an alleged relationship between plaintiff's historical sales and the value of the gross national product of the United States, as well as an asserted relationship between plaintiff's sales and annual sales of all manufacturing companies in the United States. These projections were rejected because plaintiff adduced no evidence "that its wooden skewer business was in any way comparable to [GNP or total manufacturing sales]" and "no consideration was given to the future state of the skewer market" (421 F.2d at 82, 83).

Similarly, in *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 391 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963), to calculate damages with respect to one product (asphalt saturated felt) it was assumed that the price movements of the felt could be predicted from the price movements of *mopping asphalt*. In rejecting this method of proving damages, the court noted that it was a "fallacious method of calculation for the reason that there was no evidence to support the claim that there is a general overall pattern that mopping asphalt and felt move in any particular relation to each other." *See also, Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Wolfe* v. *National Lead Co.*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962).[59]

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[59] In reaching his profit projections ranging between $13,000,000

B. Textura's Internal Records Provide No Basis for Projecting Future Lost Profits

The award of single damages in the amount of $531,617 indicates that the jury probably rejected the fanciful projections of the experts and adopted the alternative approach gratuitously suggested by counsel for plaintiff during closing argument.[60]

As noted above, counsel argued that for purposes of determining damages, the jury could simply disregard the experts' testimony if they wanted to and "make a determination based on Plaintiff's Exhibit 47, which shows that for the first six months of 1966 Textura had sales of $800,000 and profits of $55,000" (App. 1175). This reference suggested to the jury that they could take the unaudited, uncertified statement for the first six months of 1966 and project it forward as a basis for predicting what Textura's sales would have been had the company not gone out of business.

Use of Plaintiff's Exhibit 47 (the "Berman Statement") (App. 1387) suffers from two fatal flaws: (1) there is no evidence that PX 47 or the period it purports to cover is a representative one and (2) PX 47 itself was not competent or relevant evidence on which to base a determination of damages.

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and $57,000,000 (App. 1772), Dr. Mosich relied entirely upon the accuracy of Dr. Bruner's sales projections and performed merely the arithmetic function of applying to Bruner's sales projections the various cost and profit percentages derived from the June 30, 1966 financial statement (App. 1387). (*See* App. 835).

[60] We do not concede, however, that placing in evidence such "expert" analyses under the ostensible sponsorship of a respected institution of higher learning had no influence on the jury's award of damages. We believe such a "big bite" approach as plaintiff used here was highly prejudicial since at the minimum it invited the jury to fall back to the next highest level of possible damages. As the Court said in the *Farmington* case (421 F.2d at 83), "there was adequate reason to fear that the jury would be either confused or mesmerized by the profusion of computations."

There was a total failure on the part of plaintiffs to produce evidence to show that the first six months of 1966 in Textura's operation, as covered by the Berman Statement (App. 1387), was a typical or representative period of operation to use as a base for projecting profits in a "before and after" context. As noted above, Textura typically wound up each year with a loss when its books were actually audited and interim "profits" were wiped out. Moreover, Powrie himself testified that Textura "ran in spurts" (App. 513) and the most that can be said for PX 47 is that it reported one of the "spurts", with no assurance at all it would be any longer-lived than the company's previous "spurts", which were typically washed out by large losses.

In *Peter* v. *Union Oil Co.*, 328 F. Supp. 998 (C.D.Cal. 1971), the court found that plaintiff's damage theory was fatally flawed where an attempt was made to use 1968 as a normal year for financial information as to "average commissions earned" without introducing sufficient evidence to permit the court to conclude that this year was appropriate to use as a norm. The court equated this failure to offer key evidence as to the theory of damage to a failure to prove the fact of damage and reversed the damages portion of the verdict. 328 F.Supp. at 1002-03. Plaintiff's suggested use in the present case of the first six months of 1966 as a norm for computing damages here is simply unwarranted and without basis in the evidence.

In addition, the Berman Statement was totally lacking in reliability or competence and should never have been admitted into evidence. The statement was only a pencil draft which was never typed (App. 688) and was prepared by the deceased Mr. Berman, a member of Textura's accounting firm (App. 686). The statement was uncertified and unaudited, and as such the accounting firm was not able to express its opinion on the statement (App. 723-24). Indeed, the draft statement was never released by the accounting firm or issued by it to anyone. Mr. Zimmerman (also of Textura's accounting firm) had only spoken to Berman about a single aspect of the statement:

the so-called Del Webb job, the $68,000 value of which had been improperly included in the statement and the removal of which Berman had insisted upon. Mr. Zimmerman did not discuss with Berman any other aspect of the statement (App. 690-91).

Indeed, the statement appears to be little more than a copy of the internal statements prepared by Textura's bookkeeper, Miss Sharp, with the one improper $68,000 sale eliminated. Uncontradicted testimony shows that the internal statements prepared by Miss Sharp were unreliable. For instance, Textura's June 1966 statement prepared by her contained *July sales* in addition to the Del Webb invoice (App. 919), while the *expense* book was cut off as of the end of *June* (App. 921). This would clearly result in overstated sales and profits.[61] Because of its high degree of unreliability, the Berman Statement should have been excluded by the court below.

In a recent California case the court found that the "very linchpin" of plaintiff's damage theory was defective where plaintiff relied on an unaudited profit and loss statement as a basis for predicting and projecting lost profits. See *Knutson* v. *Daily Review, Inc.*, 383 F.Supp. 1346 (N.D.Cal. 1974). The accountant in *Knutson* relied on unverified and uncertified figures, representations and estimates supplied by the plaintiff—as Mr. Berman obviously did here—and the court noted furthermore that the period selected was "artificial" (383 F.Supp. at 1381-83).

A factual situation strikingly similar to that of the instant case was presented in *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). The *Seagram* plaintiff went out of business in 1965 and its accounting expert prepared exhibits showing future sales of the defunct business based on a "trend" discerned in figures

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[61] Mr. Powrie admitted that Textura regularly kept the books open and included sales in subsequent months in the financial statements for earlier months in order to "make the previous month look as big as possible in sales . . ." (App. 585-86).

from the first six months of 1964. This "trend" resulted in record sales for 1965 and was then extended over a period of four years with continuing record sales being forecast. The court found two defects. First, that the 1964 "trend" was not borne out by what had happened in prior years. In other words, the six-month period chosen was *not* a representative one. Secondly, the court held that the projection of these large record sales into the the future was nothing more than an assumption built upon the first unwarranted assumption and as such amounted to "rampant speculation" (*id.* at 87). Similarly, in the present case an atypical period and totally unreliable figures were used in attempting to project record sales for Textura, with its long prior history of substantial losses simply being ignored. The award of damages is thus based on nothing more than "rampant speculation" and as such it must be set aside.

CONCLUSION

For all of the foregoing reasons, the judgment below should be reversed with instructions to enter judgment for defendants. In the alternative, due to the procedural errors below as described in the brief filed by appellant Clark-Schwebel, a new trial should be granted.

September 24, 1975.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Extracts From the Deposition of William C. Hornickel, taken by Defendants on December 17-18, 1970, and Designated by Defendants on September 3, 1974 and October 11, 1974, as Among the Depositions to be Read at Trial.]

Q. Mr. Hornickel, just let's start with some background information. Who is your current employer? A. Chemical Bank—Dommerich Division.

Q. How long have you been with them, sir? A. I've been with the Dommerich Division since 1930.

* * * * * * * * * * *

Q. Would you be kind enough to again, going back, describe for us how you came to know of the Del Webb job, when you first learned of it and your contact with it, sir. A. By the date on this letter, I'm reminded on July 7, 1966, Mr. Powrie telephoned me. He indicated that he was about to leave town; he would like to arrange for some funds; and he was forwarding invoices that would total some $70,000 in which would be contained $68,800—I don't know that he gave it to me in the exact dollars, but $68,000, to be billed—being billed to Del E. Webb Corporation.

He told me that in order to make this a valid situation, he was forwarding—he was forwarding a letter of agreement, which would be signed by Del Webb, accepting this invoice, especially since he had made the arrangement with them and they were satisfied to do this, the terms being four per cent, 60 days as opposed to their normal terms of net-30.

He wanted his normal 90 per cent. I said this is highly irregular and I can't even consider talking about 90 per cent of $78,000.

He told me that his bookkeeper would need funds during the week that he was away. And I agreed, upon his representation, that this letter would be, in effect, a promise to pay to arrange for some $30,000 on that promise to pay.

Q. Let me just get some of this straight at this point. Mr. Powrie told you that he was forwarding to you a signed commitment by Del Webb that they were agreeing to pay this? A. He was forwarding me a letter of agreement, which he said would be signed. Now, you can interpret that a number of ways. I assume I was getting a letter with the signature.

When I got the letter, it wasn't a letter of agreement, it was an offer.

Q. The letter you're referring to, sir, for the record, is Deposition Exhibit 257, and also a copy of which is also Deposition Exhibit 623.

Would you please continue?

A. As I say, when I got the letter I was then greatly disturbed because it wasn't any agreement to pay. It was just an offer, which would indicate to me that such a thing was not really in effect, and Mr. Powrie was out of town.

His bookkeeper was in trouble as to the $30,000. I arranged for the funds would be forwarded regardless, pending Mr. Powrie's arrival—Mr. Powrie's return, evaluating at that moment that I had Mr. Powrie's guarantee, security, and something would be straightened out when he got back.

* * * * * * * * * *

Q. So as I understand it, again, based upon the fact that you, even though—I take it you questioned the validity of this? A. Yes, it was a very unusual situation.

* * * * * * * * * *

Q. Let me give you Exhibit 315 which is the advance records for Fenestra, and again I ask you, had you accepted the account by that date? A. I had not accepted it as an account. I was awaiting the return of Mr. Powrie to discuss the situation with him.

Q. When did Mr. Powrie return? A. Mr. Powrie was away, to the best of my recollection, the entire week in which July 11th occurs, whatever that might have been.

Q. Did you make any inquiries directly of Del Webb? A. I contacted the Del Webb controller's office.

Q. What did they tell you about this account, sir? A. And they had no knowledge of any such agreement. And they were surprised that any such thing might be considered.

* * * * * * * * * *

Q. When Mr. Powrie came back, what happened? A. When Mr. Powrie came back I discussed the situation with him. He tried to satisfy me with the fact that he would be able to obtain such a promise of payment. It never came forth as we know.

In the meantime I was now considerably upset with the whole situation, but I knew that Mr. Moskowitz would be out in a week or so, and I preferred to wait and discuss the situation with him in person.

* * * * * * * * * *

Q. Why did you call the Del Webb controller's office? Is that the normal place you'd call to find out this information? A. Well, they normally know about promises to pay, which would be in effect an account receivable to us.

Q. Let's go back for a second on your telephone conversation with Mr. Powrie. So we can try to get the record as clear as possible, to the best of your recollection, can you give us exactly or as closely as possible the words that you used to Mr. Powrie in describing your dissatisfaction with this account which you say implied at a minimum that you were not accepting this account at this point. A. I certainly can't recollect the words. I had to have had a very serious discussion, because I was certainly upset by the deal.

Q. Did you tell Mr. Powrie that you contacted Del Webb and that they had indicated that approval had not been given? A. I'm trying to think. I think I did. His answer, however, was that he would arrange with some higher-ups to have this thing taken care of.

Q. Did he ever? A. He never did.

Q. Did he ever give you any reason why he couldn't arrange it with higher-ups? A. No, he didn't. Because by this time I was awaiting Mr. Moskowitz, by this time

just a few days away Mr. Moskowitz was coming in, and as result of Mr. Moskowitz' arrival, certain action was taken.

* * * * * * * * * *

Q. Did you do anything else concerning the Del Webb job prior to Mr. Moskowitz arriving, that you've not already told us about? A. I can't recall just exactly what other things I might have done. I can only say that I was anxiously awaiting some resolution of this, and it would happen when Mr. Moskowitz arrived.

Q. Mr. Moskowitz arrived on July 25th, did he not? A. Yes.

* * * * * * * * * *

Q. Would you tell us to the best of your recollection, what you said to Mr. Moskowitz, what he said to you, and what was done concerning this account? A. Mr. Moskowitz usually goes direct to the hotel the first day he arrives and we get together the next day. It would be my recollection that on that day I told Mr. Moskowitz what occurred. And Mr. Moskowitz was quite upset with me and very upset with Mr. Powrie. Saying to me, "You have now allowed an over-advance."

He wanted to know whether any of Mr. Berman's figures had been made available.

He wanted to know immediately what we could determine along those lines, so I telephoned Mr. Berman.

Mr. Berman, in his somewhat concerned voice, asked if he could come over immediately to my office and meet with Mr. Moskowitz and me.

Shall I just go on in a general way now?

Q. Yes. Please continue and then we can come back and pick up.

I'd like to have what happened on that day to the best of your recollection and then we can go back and probe it as may be necessary. A. When Mr. Berman came in he was evidently greatly concerned. He had something that he wanted to tell us. He wanted to tell us in confidence. And then he went ahead and told us the story, that he had worked on the June 30th figures; he had them pretty close

to completion, but that Mr. Powrie was insisting that he do certain things which he was not about to do.

Q. Did he tell you what—— A. The certain things being the insertion of later billings into the June 30th receivables.

One of which was mentioned was the Del Webb situation.

Q. Did he say anything else to you? A. Well, he just said, "I'm not about to do it."

Q. Did he give you any reason why he was not about to do it? A. It certainly wasn't a proper thing—being a CPA, these things aren't done in proper accounting circles. And if it meant that he had to get off the books, he would get off the books. He was not going to do it.

Q. Did he say whether he considered it a dishonest practice? A. Well, we all considered that a dishonest practice. I don't think he had to tell us that.

Q. You say he mentioned the Del Webb job to you. What did he say about the Del Webb job to you? A. Well, he mentioned that—the discussion of putting the Del Webb job in the receivables, and this certainly would not have been a proper—well, it wouldn't have been a proper thing any more than inserting any others, except that in this case he was talking about something on which purchases hadn't even been made.

Q. Did he say anything else that you can recall? A. Well, I'm sure we talked further. I don't remember at the moment what else he might have said.

Q. I take it he did tell you, though, that he would refuse to issue the June 30th financial statement? A. Quite definitely. As I said, he would rather get off the books.

Q. Just so the situation is clear, Mr. Hornickel, when Mr. Berman said he refused to issue the financial statement for June 30th, I take it that the basis was that he wanted Mr. Powrie to do certain things with the books so that—— A. Well, he didn't want to be putting out false figures.

* * * * * * * * * *

Q. Did you have any other discussions with Mr. Berman that morning that you can recall? A. Well, the situation was pretty final. His decision was pretty final, and of course, we didn't have to wait for his decision. Just learning of this, Mr. Moskowitz said this is it.

Q. Meaning? A. We'll terminate.

Q. And I take it the decision to terminate the account was made on May 25, 1966? A. July——

Q. July 25th—— A. July 26th, if that isn't a weekend.

Q. July 26th, okay.

Did you and Mr. Moskowitz have any further discussions about that account that day while Mr. Moskowitz was in California that you can recall? A. Well, we probably went over the circumstances and criticizing the situation. We didn't have to give each other any reasons for the action decided upon. It was all there, it was going to be done.

And I finally, after Mr. Moskowitz left—not while Mr. Moskowitz was there—we didn't want Mr. Moskowitz to become involved with explanations or anything of the sort —telephoned Mr.—I thought I owed him that, I telephoned Mr. Powrie, told him that we were taking—going along with our rights according to the contract and giving him 60 days' notice of termination. That he would get a letter shortly to that effect.

Q. Do you recall when you informed him? The letter of termination is dated August 10th. A. Well, I know I informed him before that. And I informed him on the last day of Mr. Moskowitz' stay.

75-7332

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CARLYLE MICHELMAN, TRUSTEE OF TEXTURA LTD. IN BANKRUPTCY PROCEEDINGS,

Plaintiff-Appellee,

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION and BURLINGTON INDUSTRIES, INC.,

Defendants-Appellants.

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DOCKET NO. 75-7332

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 1975, two copies each of the printed versions of the "Brief of Appellant Burlington Industries, Inc." (dated September 24, 1975) and the "Reply Brief of Defendant-Appellant Burlington Industries, Inc." (dated November 13, 1975) were sent by first class United States mail, postage prepaid, to each of the following counsel of record in the above case:

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